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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. 821

LAS VEGAS HACIENDA, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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CIVIL AERONAUTICS BOARD,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 16, 1962.

Citations to Opinions Below.

The opinion of the Civil Aeronautics Board [R. 20-58] is as yet unreported and is printed in Appendix B hereto, *infra*, pp. 4-39. The opinion of the Circuit Court of Appeals is also as yet unreported and is printed in Appendix B hereto, *infra*, pp. 40-57.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 16, 1962 [R. Vol. III]. A timely petition for rehearing filed February 15, 1962, was denied on February 23, 1962 [R. Vol. III]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

1. Whether airplane trips furnished its patrons by a business concern in furtherance of its principal hotel and entertainment business and without additional charge is common carriage "for compensation or hire," subject to economic regulation by the Civil Aeronautics Board under the Federal Aviation Act of 1958.
2. Whether an opinion of the Civl Aeronautics Board determining the scope of its own statutory jurisdiction is subject to limited or independent judicial review.
3. Whether the Civil Aeronatuics Board's cease and desist order which by its terms directs "Las Vegas Hacienda, Inc., * * * to cease and desist from violating Section 401(a) of the Act" is invalid because too broad and uncertain.

Statute Involved.

The statutory provisions involved are Section 101(4), (10), (20) and (21), and Section 401(a) of the Federal Aviation Act of 1958, 72 Stats. 737 and 754, 49 U. S. C. Section 1301(4), (10), (20) and (21), and 1371(a). They are printed in Appendix A, *infra*, pp. 1-3.

Statement.

Petitioner, Las Vegas Hacienda, Inc. (Hacienda), operates a resort hotel at Las Vegas, Nevada. For some time, it has advertised and sold a package "Champagne Tour" in the Los Angeles area which includes, among other items, a round trip airplane trip between Los Angeles and Las Vegas [R. 25-28].

This case was commenced on June 15, 1959, by the filing of a petition for enforcement and a formal complaint by the Civil Aeronautics Board's Office of Compliance, now the Bureau of Enforcement [R. 3-6]. The complaint charged Hacienda with engaging in Interstate Air Transportation as a common carrier "for compensation or hire" without operating authority from the Board in violation of Section 401(a) of the Federal Aviation Act of 1958, 72 Stats. 754, 49 U. S. C., Section 1371(a).

The sole issue was economic regulation. Safety was in no way involved.

Jurisdiction of the Board was invoked under Section 1002 of the Act, 72 Stats. 788, 49 U. S. C., Section 1482.

After hearings held in Washington D. C. and Los Angeles, California, the Trial Examiner rendered his "Initial Decision" filed May 20, 1960 [R. 20-52], which was subsequently adopted by the Board on August 12, 1960 [R. 52-57]. The Board concluded that petitioner was engaging in "Interstate Air Transportation" as a common carrier for compensation or hire in violation of Section 401(a). Its order accordingly provided that petitioner "Las Vegas Hacienda, Inc., and its agents, successors, and assigns, cease and desist from

violating Section 401(a) of the Act" [R. 52]. Thereafter, the Board denied a petition for rehearing, but granted petitioner a stay pending the outcome of the case on appeal [R. 56-57].

The facts are as follows:

Hacienda's principal business is operating a hotel and providing entertainment for the public [R. 25, 36]. Other hotels bearing the name Hacienda are located in three cities in California and in forty-one other location in the east. The Las Vegas and three California hotels, though separately incorporated, are principally owned by the same person who serves as the Chairman of the Board of each [R. 25].

The "Champagne Tours" and the round-trip airplane trips included are designed to promote Las Vegas Hacienda's hotel and entertainment business in lieu of the elaborate night club floor shows more customary in Las Vegas [R. 117, 236-237, 243-244, 262-263]. Those who take the tours account for only nine percent of the hotel's patrons; the vast majority use surface transportation [R. 31].

The tours are sold by Hacienda's own ticket offices and by travel and tour agents [R. 29]. Tour patrons are solicited from the general public in the Los Angeles area through various advertising media, including radio, newspapers, and brochures [R. 29]. Despite Hacienda's efforts to prevent it, some people purchase the tours merely to obtain transportation [R. 31, 38-39].

The total price of a "Champagne Tour" is $27.50. In addition to the airplane trip, the tour package includes: limousine transportation from the airport to the hotel ($1.50), a round of golf on the hotel course ($4.00), a chance in the Hacienda "hole in one" contest ($2.00), a bottle of champagne ($12.50), a buffet dinner in the hotel dining room ($2.50), and $5.00 for use in the hotel casino [R. 29-30]. The aggregate price of the *other items* making up a "Champagne Tour" is thus $27.50—the total tour price [R. 29-30]. Those who take the "Champagne Tours" pay exactly the same price for the above items as those who use other means of transportation [R. 31, 114-116, 236, 254, 267-268]. Hacienda accordingly attributes no income to the airplane trips in its bookkeeping. Expense is charged to general overhead [R. 31, 114-116, 236, 254, 267-268].

The Board nevertheless held that the tour airplane trips were "for compensation or hire" as the "tour contract is not divisible * * * and the price which the patron pays for the package tour must be considered as including compensation for transportation," that the airplane trips therefore "constitute interstate common carriage for compensation or hire within the meaning * * * of the Act" (Appendix B, *infra*, pp. 22, 25).

The Court of Appeals for the Ninth Circuit affirmed the Board's decision holding first that it was obliged to accept the Board's holding as it had "Warrant in the record and a reasonable basis in law,"

citing *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 131 (1944), and *N. L. R. B. v. Coca-Cola Bottling Co.*, 350 U. S. 264, 269 (1956); *Swift & Co. v. United States*, 316 U. S. 216, 224-225 (1942); *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 184-185 (1938). Though it stated that an agency may not finally decide the limits of its statutory power which is a judicial function, citing *Social Security Board v. Nierotka*, 327 U. S. 358, 369 (1946), the Court nevertheless reasoned that the question presented involved the application of technical knowledge which the Board and not the Court was presumed to have (Appendix B, *infra*, pp. 43-44). The Court of Appeals further held that Hacienda was competing commercially in the market for the patronage of the general public and that the underlying policies of the Act therefore required that its flights be classified as common carriage "for compensation or hire," so as to bring them within the regulatory power of the Board (Appendix B, *infra*, pp. 41-49). The Court also upheld the Board's cease and desist order against attack on the ground it was unsupportably broad and uncertain, holding that the question was disposed of for the Ninth Circuit by its prior decision in *Consolidated Flower Shipments, Inc. v. C. A. B.*, 213 F. 2d 814, 818 (9th Cir. 1954), and that any uncertainty could in any event be resolved by reference to the "Board's complaint, investigation, and opinion." The Court, however, stated that the form of the Board's order was not a desirable one, and that it should not be too difficult for the Board to frame an adequate more specific order (Appendix B, *infra*, p. 55).

REASONS FOR GRANTING THE WRIT.

I.

The "Compensation or Hire" Question.

1. Importance.

The question presented is clearly of importance in the administration of the federal aviation laws. It calls for interpretation of the "for compensation or hire" language of the Federal Aviation Act, which delimits the persons to whom the Act applies and determines the scope of the Civil Aeronautics Board's regulatory powers and prerogatives in the economic sphere. As stated by the Ninth Circuit in its decision below (Appendix B, *infra*, p. 43).

> "The proper interpretation of this statutory term ('air transportation' ultimately defined as 'carriage by aircraft of persons . . * * * as a common carrier *for compensation or* hire') is * * * of crucial importance in the administration of the act."

The legislative history also emphasizes the importance of the question:

> "This section contains the definitions of the important terms used in the bill. The most important terms *defined in this section are 'air carrier' and 'air transportation'.* These terms delimit the persons to whom the act applies." *(H. R. Rep. No. 2254, Part I, 75th Cong., 3rd Sess., at p. 5).* (Emphasis added.)

This question has heretofore been touched on only tangentially in two other reported cases: *Consolidated Flower Shipments v. C. A. B.*, 16 C. A. B. 804, 819 (1953), affirmed 213 Fed. 2d 814 (9th Cir. 1954).

and *Hacienda Hotels U. S. Aircoach Enforcement Proceeding*, 26 C. A. B. 372 (1958). A third case, *M & R Investment Co., dba Dunes Hotel, et al. v. C. A. B.*, Case No. 17314, which arose on substantially the same facts, is presently being held in abeyance by the Ninth Circuit pending the outcome of the instant case. This Court has apparently never spoken directly or indirectly on the matter.

Settlement of the question is plainly in the public interest. Until this Court rules, the line marking off common and private carriage under the Act, therefore the scope of the Board's statutory powers and prerogatives in the sphere of economic regulation, will necessarily remain uncertain.

Settlement of the question by this Court is further plainly in the public interest as Petitioner's package tour is only one of a considerable number of similar, though not identical, tours which provide transportation by air to and from various cities in Nevada, *i.e.* Las Vegas, Reno, Hawthorne, Tonopah, and Searchlight. Some of these tours also involve flights originating in the Los Angeles area; others involve flights originating, not only in California, but in cities throughout the United States, *e.g.*, San Francisco, Salt Lake City, and Chicago. The total number of persons carried is substantial. Hacienda's figures show that in excess of 7,000 persons each month are provided transportation by such tours.

Additionally the rationale of the decision by the Court below and the principles of law relied upon reach far beyond the confines of the facts of the instant case. As the Court below itself stated (Appendix B, *infra*, p. 49, n. 17):

> "* * * the furnishing of private carriage on a gratuitous basis is not at all unusual. The carriage of officers, employees and selected-customers in company-owned planes is an example. *Even this is a matter of degree, and miscellaneous carriage of this type could move into the area of common carriage and become subject to the Act if sufficiently expanded and regularized.*" (Emphasis added.)

In short, the potential reach of the Ninth Circuit's opinion encompasses not only the operation of tours like those here, but also the operation of "customer," "executive," and like aircraft by any business.

The question is also of importance to the regular scheduled and certified airlines as the final decision will determine in part the extent of their competition. This was of course the focal point of the Ninth Circuit's opinion and has been emphasized throughout this proceeding by the Bureau of Enforcement in its briefs. Significantly, two such airlines, Pacific Airlines Inc. and Bonanza Airlines Inc., regarded the case of sufficient importance to warrant their appearing and participating in the proceedings before the Board, pursuant to Rule 214 of the Board's Rules of Practice [R. 23].

By the same token the interest of the public is involved. Hacienda's tour flights have received widespread public acceptance as the substantial and increasing number of persons carried attests. People like the tours. The service is unique. Flights operate at off-hours when the scheduled carriers do not fly. They require no government subsidy. Hacienda has found that many persons are introduced to air transportation for the first time thereby.

Finally, settlement of this question is of importance in the administration of the federal laws regulating other modes of transportation under which the "for compensation" and/or "hire" language also delimits the scope or type or regulation. See: *Interstate Commerce Act, Part I*, 49 U. S. C., Section 1(3)(a) (rail and pipe-line carriers); *Interstate Commerce Act, Part II* (the so-called Motor Carrier Act), 49 U. S. C., Section 303(14)(17) (truck and bus carriers); *Interstate Commerce Act, Part III*, 49 U. S. C., Section 902(d) (water carriers).

Decisions under the various Acts are cited and relied upon as authority under the others interchangeably as evidenced by the decisions of both the Court and Board below. See also: *Arrow Aviation v. Moore*, 266 F. 2d 488 (8th Cir. 1959); *Semon v. Royal Indemnity Co.*, 279 F. 2d 737 (5th Cir. 1960).

This Court has apparently not as yet considered the meaning and effect to be given the "for compensation or hire" language. A decision here would therefore be of importance in the area of federal regulation of transportation in general.

2. Decision Below in Error.

It is respectfully submitted that the decisions of the Board and Court below are in error. The Board's decision is in error as it confuses "consideration" and "compensation or hire," and is contrary to the overwhelming weight of authority in the law of carriers. The Court's decision is in error as it fails to apply or give effect to the well established technical meaning of the controlling "for compensation or hire" language, which the legislative history and policies most specifi-

cally in point indicate Congress intended to adopt. Moreover, the decision is instead bottomed on the inapposite broad underlying policies of the Act. As such, it is contrary to the principles and reasoning of several decisions by this Court.

The Board's decision, accepted by the Circuit Court as binding, is in error as it confuses "consideration" and "compensation or hire." In the cases relied upon by the Board to support its result, the issue in each instance was whether there was "consideration" to support one of several allegedly severable contractual promises, not whether there was "compensation" or "hire." See cited by the Board: *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 298, 86 L. Ed. 855 (1942); *Tuesco Oil Co. v. Brewer*, 66 P. A. 351, 354 (1870); *E. I. DuPont de Nemours & Co., Inc. v. Kaufman & Chernick Inc.*, 148 N. E. 2d 634, 636 (Mass. 1958); *Traiman v. Kappaport*, 41 F. 2d 336, 338 (3rd Cir. 1930). However, a promised performance may be supported by "consideration" in the contractual sense, but still not be for "compensation" or "hire." *Cf., Re Larchmont Apartments Inc.*, 16 P. U. R. 3rd 45, 47 (New York Pub. Serv. Comm'r. 1956). Compare: *Village of Brookfield v. Goldblatt, Inc.*, 33 P. U. R. (N. S.) 82, 92 (Illinois C. C. 1940).

"Compensation" is defined in the law of carriers as that which is the equivalant of, makes whole or good, or counterbalances, in accordance with its ordinary or dictionary meaning. The word "compensation" thus imports recovery of costs. *Hughson Condensed Milk Co. v. State Board of Equalization*, 23 Cal. App. 2d 281, 73 P. 2d 290 (1937); *Kroger Grocery & Bak-*

ing Co. v. City of Cynthiana, 240 Ky. 701, 42 S. W. 2d 904 (1931); *Woitishick Common Carrier Application*, 42 M. C. C. 193, 201 (1943). On the other hand, "hire" requires profit or reward as has been held by the Board. *Consolidated Flower Shipments Inc.*, 16 C. A. B. 804, 819 (1953), aff'd 213 F. 2d 814 (9th Cir. 1954). "Consideration" which involves no inquiry as to adequacy, indeed precludes such inquiry, is hence one thing, "compensation" or "hire" quite another.

The Board's opinion is contrary to the overwhelming weight of authority. The carrier cases with only two exceptions hold that carriage is not for "compensation" or "hire" under the accepted meanings of those terms, where, as here, the facts show that a business charges its patrons the same price and no more for its goods and services when transportation is provided, as when it is not. See: *Passenger cases-price the same: Re Larchmont Apartments Inc.*, 16 P. U. R. 3rd 45 (New York P. S. C. 1956); *Yellow Cab v. Skyways Service Co.*, 36 P. U. R. 3rd 154 (Colorado P. U. C. 1960); *Property cases-Price the same:* see particularly the case of *Collins-Dietz-Morris Co. v. State Corporation Commission*, 154 Okla. 121, 7 P. 2d 123 (1931); also *Rountree v. State Corporation Commissioner*, 40 N. M. 152, 56 P. 2d 1121 (1936); *Compare-Price different: New Way Lumber Co. v. Smith*, 128 Tex. 173, 96 S. W. 2d 282 (1936); *Consolidated Rock Products v. State*, 57 Cal. App. 2d 959, 135 P. 2d 699 (1943); *Accord: On facts, but less extended express discussion-price the same: Kroger Grocery & Baking Co. v. City of Cynthiana*, 240 Ky. 701, 42 S. W. 2d 904 (1931); *Hughson Condensed Milk Co. v. State Board of Equalization*, 23 Cal. App. 2d 281, 73 P. 2d 290 (1937); *Griffin v. Murphy*, 51 S. D. 50, 211 N. W.

804 (1927); *Murphy v. Standard Oil of Indiana*, 49 S. D. 197, 207 N. W. 92 (1926); *People v. Montgomery*, 92 Colo. 201, 19 P. 2d 205 (1931); *Company price different: Smith v. Texas Farm Products*, 86 S. W. 2d 52 (Tex. Civ. App. 1935); *Shores and Brown Common Carrier Applications*, 26 M. C. C. 243 (1940); *see also holdings consistent with above cases-price the same: Christie Transfer & Storage Co. v. Hatch*, 95 Mont. 601, 28 P. 2d 470 (1934); *City of Sioux Falls v. Collins*, 43 S. D. 311, 178 N. W. 950 (1920); *State v. Manhattan Oil Co.*, 199 Iowa 1213, 203 N. W. 301 (1925); *Walker v. Kolb's Bakery & Dairy*, 176 Md. 191, 4 A. 2d 430 (1939); *Ward Baking Co. v. City of St. Genevieve*, 342 Mo. 1011, 119 S. W. 2d 292 (1938).

The only two cases *contra*, both passenger cases, are: *Chala v. Gordon*, 26 P. U. R. 3d 47 (Cal. P. U. C. 1958); *Village of Brookfield v. Goldblatt Bros. Inc.*, 33 P. U. R. (N. S.) 82 (Ill. C. C. 1940) (but see dissent at 97-98). In both the Commissions, like the Board here, confused "consideration" and "compensation" or "hire."

The decision of the Court below is believed to be in error, as the Court dismissed and refused to apply established principles and technical meanings from the law of carriers, discussed above, which Congress intended to adopt. The Court's decision is further contrary to the decisions of the agency charged with administering the Act and to prior Court decisions.

The terms "for compensation or hire" are longstanding technical words of art. As stated by a distinguished former Justice of this Court:

> "No person is a common carrier in the sense of the law, who is not a carrier for hire, that is, who

does not receive or is not entitled to receive recompense for his services." *Opinion by Story, J., Citizens Bank v. Nantucket Steamboat Co.*, 5 Cas. No. 2730, 2 Story 16, pp. 719, 725 (Cir. Ct. Mass. 1811); See also: *Lesesne v. Atlantic Coast Line R.R. Co.*, 114 S. C. 95, 103 S. E. 147, 148 (1920); *Hutchison Carriers*, Section 15, 16, 35, 47, 48 (3rd ed. 1906).

The legislative history of the Act most directly in point indicates a Congressional Intent to adopt established principles and meanings. Again see discussion *supra*. As stated in the Senate report:

"The recognized and accepted principles of the regulation of public utilities as applied to other forms of transportation have been incorporated in * * * (the Act)." *Senate Report, No. 1661, 75th Cong., Sess., at p. 2.* See also: *So stating with reference to an earlier version of the bill: Senate Report, No. 686, 75th Cong. 1st Sess., at p. 2.*

The testimony before the Senate Committee of Commissioner Eastman, then Chairman of the Interstate Commerce Commission and one of the draftsmen of the Civil Aeronautics Act, is also pertinent:

"And you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers. That, I think, is a desirable thing because when language has been interpreted once it is desirable to have it used again, thus avoiding many questions always arising with respect to the employment of new language."

Hearings before subcommittee of the Committee on Interstate Commerce of the United States Senate, 75th Congress, 1st Sess., p. 305.

President Gorrell of the Air Transport Association, also active in the drafting of the various bills culminating in the Act, testified to like effect before the House Committee. See: *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess. at p. 264.*

It would thus appear that the legislative history shows a Congressional intent to adopt accepted principles and established technical meanings so as to avoid to the extent possible questions with respect to the meaning of new language.

Consistent with this legislative history and policy, both the Board and Courts have heretofore uniformly applied the law of carriers in determining the scope of the Board's regulatory powers. As stated by the Board itself in *Viking Airlines, et al., Non-Certified Operations*, 11 C. A. B. 401, 413-414 (1950):

> "The Civil Aeronautics Act does not define common carriage, and what constitutes common carriage is to be determined in accordance with the general law governing common carriers." (*Ibid.* 11 C. A. B. at 413-414).

See also: Illustrating the Board's approach: Joiner Investigation Case, 12 C. A. B. 879, 882-886 (1951); *Seaboard & Western Airlines*, 11 C. A. B. 372, 386 (1950); *Transocean A. L. Enforcement Proceedings*, 11 C. A. B. 350 (1950); *Page Airways Inc., Investigation*, 6 C. A. B. 1061, 1064-1066 (1946); *Alaska Air Transportation Investigation*, 2 C. A. B. 785, 788 (1941); and see: *Pacific Northern Airlines v. Alaska*

Airlines, 80 Fed. Supp. 592, 600-601 (D. C. Alaska 1948); *Alaska Air Transport v. Alaska Airplane Charter Co.,* 72 Fed. Supp. 609 (D. Alaska 1947). Indeed, the Bureau of Enforcement in the instant case took the position, in which petitioner acquiesced, that "the legislative history shows that (the term "common carrier for compensation or hire") was intended to be merely the common law description of a common carrier." (Brief for Respondent in the Court below at pp. 16-17).

The decision of the Court below in failing to apply established principles and technical meanings is accordingly not only contrary to the legislative history and policies of the Act most directly in point, but is contrary to the decisions of the agency charged with its administration. It is also contrary to the prior Court decisions.

It is further submitted that legislative history and Board decisions aside the Court below still erred by construing the controlling statutory language by resort to the board underlying policies of the Act in disregard of common and ordinary or established technical meanings. Its decision in this regard is contrary in principle and reasoning to the prior decision of this Court in *N. L. R. B. v. Coca-Cola Bottling Co.,* 350 U. S. 264, 100 L. Ed. 285 (1956). In Coca-Cola Bottling Co., the Court held on facts strikingly parallel to those here that where neither the statute itself nor its legislative history attempts a definition of statutory language, then that language is to be construed in accordance with its common and ordinary meaning, or, if it has a technical meaning as here, in accordance with its technical meaning. (*Ibid.,* 350 U. S. at 268-269, 100 L. Ed. at 290.)

In so holding, this Court rejected an argument by respondent there, see 100 L. Ed. at p. 287, that the broad construction of the statutory language by the Circuit Court was necessary to effectuate the general legislative policy underlying the statute. (*See same case below*, 219 F. 2d 441.)

The decision of the Court below would appear to also be contrary to, or at least inconsistent with the decision of this Court in *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488 (1944). There also, this Court rejected a most compelling call for resort to the broad underlying policies of the statute and insisted that the jurisdictional language of the statute, "area of production," be given its common and ordinary meaning. In the *Addison* case again, there was no express attempt at definition, either in the Act itself or the legislative history. The Court stated:

> "While the judicial function in construing legislation is not a mechnical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation (citation omitted). To blur the distinctive functions of the legislative and judicial process is not conclusive to responsible legislation." (*Ibid.*, 322 U. S. at 618, 88 L. Ed. at 1496-1497).

The Court below failed to heed this admonition and improperly entered upon the legislative domain. It determined the scope of the Board's regulatory powers by recourse to its own views as to the necessity for regulation in order "to foster sound economic conditions, pro-

mote economical and efficient service at reasonable charges, and avoid destructive competitive practices." This was for Congress to decide. And it did decide when it limited economic regulation to common carriage "for compensation or hire." Under the decisions of this Court, it was the duty of the Court below to give effect to that language in accordance with its well established technical meaning and not to enter, either implicitly or explicitly, upon a legislative inquiry as to the possible economic impact on other carriers and the traveling public. That is an inquiry which the Courts with their limited facilities and procedures for investigation are relatively ill equipped to make and which in the instant case is unsupported by any evidence of record whatsoever.

The decision of the Court below is believed to be in error for still another reason. It is submitted that the Court below erred in holding petitioner's flights to be for "compensation or hire," as they are provided "in furtherance of a business," *i.e.*, petitioner's principal hotel and entertainment business. The words "carriage * * * in furtherance of a business" expressly appear in Subsection 20 of Section 101 of the Act (49 U. S. C. Sec. 1301(20)) defining "Interstate Air Commerce," which covers carriage subject to safety regulation. Those words do not appear in Subsection 21, defining "Interstate Air Transportation" which covers carriage subject to economic regulation. Thus where Congress intended to regulate "carriage in furtherance of business," *i.e.*, under Subsection 20, it said so in so many words. In defining the scope of the Board's regulatory powers in the economic sphere, under Subsection 21, Congress was, however, silent.

The legislative history shows clearly that the omission of "carriage * * * in furtherance of a business" from Subsection 21 was one of carefully considered and deliberate choice, not oversight.

In earlier versions of the bill finally enacted, the "in furtherance of a business" language was first excluded, then included, and finally excluded from the definitional subsection covering economic regulation. See: The text of the various predecessor bills set forth in Appendix C, *infra*, pp. 58-63, see also: The remarks of Senator McCarran tracing the history of the provision, *83rd Congressional Record pp. 6635-6637*, and See *Rhyne, Civil Aeronautics Act Annotated, Appendix A* (1939). As indicated by one eminent authority, earlier proposed versions of the Act "included the regulation of aircraft used in furtherance of a business in an attempt to cover all commercial operations." (*Rhyne, Civil Aeronautics Act Annotated at pp. 42-43* (1939).) But, the provision finally enacted, Subsection 21, carved the provision down, omitting any reference to "carriage * * * in furtherance of a business," thereby narrowing the scope of economic regulation to exclude it.

The Court below clearly erred by putting back into the Act what Congress had taken out and by in effect lifting the "in furtherance of a business" language from subsection 20, where it does appear, and reading it into subsection 21, where it does not appear.

The result reached below is further contrary in principle and reasoning to at least two prior decisions of this Court which have applied the doctrine of "Express Mention, Implied Exclusion" here relied upon, under like circumstances, see: *United States v. Atchison, Topeka & Santa Fe R. Co.*, 220 U. S. 37, 44, 55 L. Ed. 361

(1911) (Holmes, J.), and *United States v. Wiltberger*, 18 U. S. 76 (5 Wheat. 76), 5 L. Ed. 73 (1820), to the decision of the Second Circuit in *Corn Products Refining Co. v. Benson*, 232 F. 2d 554, 561-562 (2d Cir. 1956), and to the parallel decision involving the same language of the Interstate Commerce Commission in *Woitishek Common Carrier Application*, 42 M. C. C. 193 (1943). See also cases collected: *2 Sutherland, Statutory Constructions*, Sec. 4915, p. 414, n. 7 (1943).

Carriage "in furtherance of a business" is "Interstate Air Commerce," it is not "Interstate Air Transportation." If Congress had intended otherwise it would have expressly included the "in furtherance of a business" language in Subsection 21, as it did in Subsection 20.

II.
The Scope of Review Question.

1. Importance.

The question presented is of obvious importance to the proper functioning of the federal judicial system in so far as the recurring problem of judicial review of decisions by the federal administrative agencies is concerned. The question of the proper scope of judicial review in such cases is pervasive.

Settlement of this question is in the public interest, as it is certain to be presented in a substantial number of cases pending now as well as in the future. Moreover, the present status of the law on the question is, to say the least, unclear and requires clarification by this Court. (See: *Davis, Administrative Law Treatise, CH. 30 1958); Cf. Jaffee, Judicial Review, Question of Law*, 69 Harv. L. Rev. 239, 269 (1955). This is illustrated by the decision of the Court below in this

case which, it is submitted, vacillated uncertainly between the decision of this Court in *Social Security Board v. Nierotka*, 327 U. S. 358, 369, 90 L. Ed. 718, 727 (1946), and its decision in *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 131, 88 L. Ed. 1170, 1184-1185 (1944); also *N. L. R. B. v. Coca-Cola Bottling Co.*, 350 U. S. 264, 269, 100 L. Ed. 285 (1956); *Swift & Co. v. United States*, 310 U. S. 210, 224-225, 86 L. Ed. 1391, 1398 (1942); *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 184-185, 83 L. Ed. 111, 118 (1938).

2. Decision Below in Error.

The decision of the Court below is believed to be erroneous as it purports to accept the Board's opinion because of the Board's presumed superior technical knowledge and competence when the Court was actually the more knowledgeable and competent. It would also appear to be contrary to the decisions of this Court most in point.

The single decision by this Court most nearly in point would appear to be *Dazies Warehouse Co. v. Bowles*, 321 U. S. 144, 153, 88 L. Ed. 635 (1944). There this Court *refused to defer* to the agencies' determination as to the meaning and effect to be given the words "*public utility*". As here, the question was primarily one of defining technical words of art with a long-standing legal connotation. The Court below's decision would also appear to be contrary to the decision of this Court in *Social Security Board v. Nierotka*, 327 U. S. 358, 369, 90 L. Ed. 719, 727 728 (1946), where the question was one of giving meaning and effect to a "well understood word—'wages'." And in *S. E. C. v. Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626 (1943), this Court again exercised its own independent judg-

ment without deferring to the agency where resolution of the question depended on a reading and analysis of common law cases. See also: The decision of the Second Circuit affirmed by this Court in *Duquesne Warehouse Co. v. Railroad Retirement Board*, 148 F. 2d 473 (2d Cir. 1945), affirmed 326 U. S. 446, 90 L. Ed. 192 (1946).

This case is wholly unlike either *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 130-132, 88 L. Ed. 1170, 1184-1185 (1943), or *N. L. R. B. v. Coca-Cola Bottling Co.*, 350 U. S. 264, 269, 100 L. Ed. 285, 290 (1956), relied upon below, where everyday experience with practical problems in the field of labor relations and knowledge of the "peculiar" use of terminology by those "intimate with trade union affairs" was held to be decisive. In both *Swift & Co. v. United States*, 316 U. S. 216, 224-225, 86 L. Ed. 1391, 1398 (1941), and *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 184-185, 83 L. Ed. 111, 118 (1938), also relied upon by the Court below, expert knowledge as to industry practices and customs was likewise essential. Not so here, where knowledge of law, not custom or practice, is decisive.

Moreover, the reasoning of the Court that it was required to defer to the Board because of presumed superior technical knowledge is most questionable under the circumstances of this case. The facts were undisputed. What the Court was specifically called upon to do was to construe statutory language, review legislative history, and analyze judge-made case law. This is what the Board did in its opinion and no more. These are matters on which Courts are the experts, not administrative agencies.

As stated by Davis in his treatise:

> "Courts are the experts in such areas as constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the agencies field." (4 *Davis, Administrative Law Treatise*, at p. 269 (1958).

III.
The "Cease and Desist" Order Question.

1. Conflict.

The decision of the Court below upholding the Board's order to petitioner to "cease and desist from violating Section 401(a) of the Act" against attack on the ground it is to broad and uncertain, and the Court's decision in *Consolidated Flower Shipments Inc. v. C. A. B.*, 213 F. 2d 814, 818 (9th Cir. 1954), upon the authority of which the instant case was decided are in conflict with the decisions of this Court in *N. L. R. B. v. Express Publishing*, 312 U. S. 426, 85 L. Ed. 930 (1941); *New Haven R.R. Co. v. I. C. C.*, 200 U. S. 36, 50 L. Ed. 515 (1905); and *Illinois Central R.R. Co. v. State Public Utilities Comm.*, 245 U. S. 493, 46 L. Ed. 425 (1917). See also: *May Department Store Co. v. N. L. R. B.*, 326 U. S. 376, 90 L. Ed. 145 (1945); *Communications Workers v. N. L. R. B.*, 362 U. S. 479, 4 L. Ed. 2d 896 (1960). In the decision cited this Court held that an order must be restricted to conduct found unlawful, or reasonably related to or *fairly* to be anticipated from such unlawful conduct. Also that a "cease and desist" order must be clear and definite in its terms.

But the Board's order here by its terms includes carriage of "property . . . and mail." (Sec. 401(a) as qualified by Sec. 101(21), Federal Aviation Act of 1958, 49 U. S. C., Secs. 1301(21), 1371(a)), "passengers" pursuant to charter agreement where there is a holding out, *Pacific Northern Airlines Inc. v. Alaska Airlines Inc.*, 80 Fed. Supp. 592 (Alaska 1948); *Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, 72 Fed. Supp. 609 (Alaska 1947), and possibly petitioner's own "officers" and "employees" "if such carriage is sufficiently expanded and regularized" (Opinion of Court below, Appendix B *infra*, at p. 49, n. 17). Patently, such carriage is not reasonably related or fairly to be anticipated from petitioner's package tour operations in the past. The decision of the Court below upholding the Board's order is hence in conflict with the decisions of this Court above cited. See particularly the *Express Publishing Co.* and *New Haven R.R.* cases, *supra*, in which the orders there issued or sought were virtually identical in terms and effect to the order here.

2. Importance.

Clearly, the question presented is of importance. The issuance of cease and desist orders is an integral part of administrative adjudication. The question is likely to be presented in most if not virtually every administrative regulatory case in which a violation is found. As to the Civil Aeronautics Board in particular, its use of cease and desist orders framed in terms of the statutory provision found to have been violated has become widespread, if it is not the general practice. See in addition to the instant case:

Consolidated Flower Shipments v. C. A. B., 16 C. A. B. 804 (1953), aff'd 213 F. 2d 814 (9th Cir. 1954). *Hacienda Hotels Motels—U.S. Aircoach Enforcement*, 26 C. A. B. 372 (1958); and *M & R Investment Co., dba Dunes Hotel, et al., v. C. A. B.*, Case No. E-10331, Docket No. 10606, decided by the Board February 1, 1961, now being held in abeyance by the Ninth Circuit pending the outcome of this case, Docket No. 17314. And resort to such broadly framed orders is, of course, by no means limited to the Civil Aeronautics Board (See, for example the Labor Board's order in *Communications Workers v. N. L. R. B.*, 362 U. S. 479, 4 L. Ed. 2d 896 (1960).)

3. Decision Below in Error.

The decision of the Court below upholding the Board's broadly framed Cease and Desist order is believed to be erroneous as the order on its face restrains conduct of petitioner wholly unrelated and not fairly to be anticipated from petitioner's past conduct. It is accordingly in conflict with both the reasoning and holdings in the following cases: *Communications Workers v. N. L. R. B.*, 362 U. S. 479, 4 L. Ed. 2d 896 (1960); *May Department Store Co. v. N. L. R. B.*, 326 U. S. 376, 90 L. Ed. 145 (1945); *N. L. R. B. v. Express Publishing*, 312 U. S. 426, 85 L. Ed. 930 (1941); *New Haven R.R. Co. v. I. C. C.*, 200 U. S. 30, 50 L. Ed. 515 (1905); *N. L. R. B. v. Ochoa Fertilizer Corp.*, 283 F. 2d 26 (1st Cir. 1960); *N. L. R. B. v. Local 369*, 240 F. 2d 539 (3rd Cir. 1956); *N. L. R. B. v. Larnar Creamery Co.*, 246 F. 2d 8 (5th Cir. 1957); *Beatty v. United States*, 191 F. 2d 317 (8th Cir. 1951).)

Petitioner was found to have violated Section 401(a) of the Act in transporting passengers pursuant to its package "Champagne Tour" operations. Yet, the Board's Cease and Desist order by its terms also enjoins violations having nothing whatsoever to do with such operations as detailed above. The decision of the Court below would accordingly appear to be in error.

The Court's decision is also believed to be in error for the related reason that the Board's order on the facts of this case is so vague and uncertain as to fail to fairly apprise petitioner of the conduct sought to be enjoined. This Court has ruled that a restraining order issued by an administrative agency must be clear and definite in its terms and has held "inoperative and of no effect" an order far clearer and more definite than that here. *Illinois Central R.R. Co. v. State Public Utilities Comm.*, 245 U. S. 493, 46 L. Ed. 425 (1917); see also: *Cf. N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 85 L. Ed. 930 (1941); *Cf. New Haven R.R. Co. v. I. C. C.*, 200 U. S. 36, 50 L. Ed. 515 (1905). The Circuit Courts have also recognized this rule: *N. L. R. B. v. Lipshutz*, 149 F. 2d 141 (5th Cir. 1945); *Caldwell Inc. v. F. T. C.*, 11 F. 2d 889 (7th Cir. 1940); *Cf. Schwegmann Bros., etc. v. Hoffman-LaRoche Inc.*, 221 F. 2d 326 (5th Cir. 1955); *Cf.* Rule 65(d) Federal Rules of Civil Procedure. State cases are collected: 28 Am. Jur., Injunctions, Sec. 293.

The holdings of the Court below that any uncertainty may be resolved "by reference to the Board's complaint, investigation and opinion" (See Opinion, Appendix B, *supra*, pp. 40-57) is unsound. The Court does not expressly state, nor did the Board, that the

order is restricted to the facts found, reasonably related, and fairly to be anticipated. There is therefore no assurance that the Board's order would be so restricted and not given a more expansive scope and effect in some subsequent enforcement proceeding. In both *Brady Transfer and Store Co. v. United States*, 80 Fed. Supp. 110 (S. D. Iowa 1948), aff'd w/o opinion 335 U. S. 875, 93 L. Ed. 418 (1948), and *Bingler Vacation Tours, Inc. v. United States*, 132 Fed. Supp. 793, 798 (D. N. J. 1955), aff'd w/o opinion 350 U. S. 921, 100 L. Ed. 806 (1955), cited by the Court below, the Cease and Desist order *expressly incorporated* the Interstate Commerce Commission's *"report."*

The Court's decision is also unsound as reference to the Board's complaint, investigation and opinion does not give the required clarification or certainty as to the terms of the Board's order. While certain principles were enunciated and certain aspects of petitioner's operation were found tainted by the Board, the significance of other relevant principles and factors is left in doubt; for example: it is unclear from the Board's opinion whether all package tour operations, however constituted, are held unlawful; what the effect of more effective procedures to control use of the flights by so-called non-guests, would be; what would constitute "compensation or hire" or different facts which did not include a package concept requiring purchase of other goods and services, etc. Moreover, there is no attempt at an overall statement of either general criteria or factors by which petitioner might guide its future conduct. Uncertainty is compounded when the "reasonably related" and "fairly to be anticipated" rules of the *Express Publishing Co.* case are considered.

Petitioner is in short told to read and interpret the Board's opinion, and then if it reads wrong in the view of the Board or some judge in a future proceeding, it will be subject to quasi-criminal sanctions and penalties for contempt. It is submitted that the art, not science, of reading case law is too thin a reed upon which to support a result requiring petitioner to conduct any possible future operations however unrelated under such "peril of a summons for contempt."

Brady Transfer & Storage Co. v. United States, 80 Fed. Supp. 110, 118 (S. D. Iowa 1948), aff'd w/o opinion 335 U. S. 875, 93 L. Ed. 418 (1918), upon which the Ninth Circuit originally relied in framing its "reference" to the record or opinion rule (see *Consolidated Flower Shipments v. C. A. B.*, 213 F. 2d 814, 818 (9th Cir. 1954), is wholly inapposite here. In *Brady*, the Commission's order expressly incorporated its report, and recourse to the report itself (*Transportation Activity of Brady Transfer & Storage Co.*, 47 M. C. C. 23, 56 (1947), reveals that the Commission set out specifically *seriatim* the acts and conduct to be enjoined (47 M. C. C. at 56). Additionally, as the District Court in the *Brady* case noted, the Commission "had gone to considerable lengths", through past rulings and regulations to set out the pertinent criteria, and it would have been impossible to be much more specific. The same would appear to be true in the similar case of *Bingler Vacation Tours, Inc. v. United States*, 132 Fed. Supp. 793, 798 (D. N. J. 1955), aff'd w/o opinion 350 U. S. 921, 100 L. Ed. 806 (1955), also relied upon the Court below, as the Commission's report again reveals. See *Asbury Park-New York Transit Corp. v. Bingler Vacation Tours,*

Inc., 62 M. C. C. 731 (1954). In *Bingler*, the Commission's opinion did not specifically set out the terms of the proposed order as in *Brady*, but the Commission did expressly and specifically identify the operations unauthorized throughout its opinion and again there were ample existing Commission rules and regulations setting forth the controlling principles and criteria.

Not so in the instant case. The Board has issued no pertinent rules or regulations. Its opinion doesn't attempt an overall statement of general principles, nor does it specifically identify the criteria or factors controlling. This, though on the record before it, it should have little difficulty in so doing. As stated by the Court below (which was of course bound as it expressly held by its prior decision in the *Consolidated Flower Shipments* case):

> "Although we sustain the order of the Board in the circumstances of this case, the form employed is not a desirable one. It should not be too difficult for the Board to frame an order prohibiting the illegal conduct in terms of criteria narrower than the statute yet broader than the precise facts of the particular case."

See Opinion of Court below, Appendix B, *supra*, p. 55, n. 35.

The decision of the Court below upholding the Board's Cease and Desist order is in error because the order is too broad under this Court's decision in *Express Publishing* and too uncertain under this Court's

decision in *Illinois Central R.R.* The Board could without undue difficulty, and accordingly, should, frame a sufficiently clear and definite more specific order.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

EDWARD L. COMPTON,
JOHN W. PRESTON, JR.,
By EDWARD L. COMPTON,
Counsel for Petitioner.

APPENDIX A.

Statutory Provisions Cited and Quoted.

Federal Aviation Act

49 U. S. C. A., Sec. 1301 (4), (10), (20) and (21):

"*Definitions*

As used in this chapter, unless the context otherwise requires—

(4) 'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(20) 'Interstate air commerce', 'overseas air commerce', and 'foreign air commerce', respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

* * *

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) 'Interstate air transportation', 'overseas air transportation' and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or

property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

* * *

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

49 U. S. C. A., Section 1371 (a):

"Certificate of public convenience and necessity—Essentiality

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Other Acts

49 U. S. C. A. Sec. 1 (3)(a):

"Regulation in General; car service; alteration of line

(3) (a) The term 'common carrier' as used in this chapter shall include all pipeline companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' * * *"

49 U. S. C. A. Sec. 303 (14) and (17):

"Definitions and exceptions—(a) *Definitions*

As used in this chapter—

(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle

in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who, or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

49 U. S. C. A. Sec. 902 (d)

"*Definitions*

For the purposes of this chapter—

(d) The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title."

APPENDIX B.

[Title of Board and Cause.]

Examiner's Initial Opinion and Order.

ERRATA SHEET

INITIAL DECISION OF EXAMINER
RICHARD A. WALSH

Served: May 20, 1960

The parties are advised that the second to the last line in paragraph two of the proposed order attached to the Initial Decision served in the above-entitled proceeding on May 20, 1960 should read:

". . . Sections 101(10) and 101(21) of the Federal Aviation Act of 1958, in violation. . ."

s/ RICHARD A. WALSH.
Hearing Examiner.

May 23, 1960.

United States of America Civil Aeronautics Board
Washington, D. C.

LAS VEGAS HACIENDA, INC., AND HENRY F. PRICE ENFORCEMENT PROCEEDING
Docket 10007

In the matter of the enforcement proceeding instituted by complaint filed by the Bureau of Enforcement against Las Vegas Hacienda, Inc. and Henry F. Price.

INITIAL DECISION OF EXAMINER
RICHARD A. WALSH

Served: May 20, 1960

Upon: John W Preston, Jr., Rowan Building, Los Angeles, California, for Las Vegas Hacienda, Inc., and Henry F. Price

William E. McCollam, Civil Aeronautics Board, Washington 25, D. C. for the Bureau of Enforcement, Civil Aeronautics Board

This decision shall become final 10 days after the date of service shown above and shall become effective upon the issuance of a Board order pursuant to Rule 28 of the Rules of Practice, unless within such 10-day period exceptions thereto are filed by one of the parties with the Docket Section, Civil Aeronautics Board, Washington 25, D.C., and served upon all other parties. If exceptions are filed and served within the period noted; briefs may be filed and served on all other parties within a further period of 20 days.

United States of America Civil Aeronautics Board

Washington, D. C.

LAS VEGAS HACIENDA, INC. AND HENRY F. PRICE ENFORCEMENT PROCEEDING

Docket 10007

Found: Las Vegas Hacienda, Inc, engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand and Las Vegas, Nevada, on the other without authority from the Board in violation of Section 401(a) of the Act.

Henry F. Price engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand and Las Vegas Nevada, on the other, with

out authority from the Board in violation of Section 401(a) of the Act.

Las Vegas Hacienda, Inc. and its agents, successors and assigns and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc. should be ordered to cease and desist from violating Section 401(a) of the Act.

Appearances: John W. Preston, Jr. for Las Vegas Hacienda, Inc., and Henry F. Price, Theodore I. Seamon for Pacific Air Lines, Inc. Albert F. Grissard and Ralston O. Hawkins for Bonanza Air Lines, Inc. William E. McCollam for Bureau of Enforcement, Civil Aeronautics Board.

INITIAL DECISION OF EXAMINER RICHARD A. WALSH

Preliminary Statement

This proceeding was instituted pursuant to Rule 205 of the Board's Rules of Practice by the filing on June 15, 1959, of a petition for enforcement by the Chief of the Office of Compliance (now the Bureau of Enforcement—hereinafter referred to as the Bureau), which petition was accompanied by a formal complaint signed by a compliance attorney of the Board. The complaint alleges that since on or about March 4, 1958, respondent Las Vegas Hacienda, Inc. (Hacienda) and respondent Henry Price have engaged and are continuing to engage in interstate air transportation as a common carrier of persons for compensation or hire between Long Beach and Burbank, California, on the one hand and Las Vegas, Nevada on the other without appropriate authority from the Board in violation of Section 401(a) of the Federal Aviation Act of 1958 (formerly

Section 401(a) of the Civil Aeronautics Act of 1938, as amended).

Pursuant to notice public hearing was held here in Washington, D.C. and Los Angeles California. Pacific Air Lines, Inc. (Pacific) and Bonanza Air Lines, Inc. (Bonanza) appeared and participated in certain phases of the hearing pursuant to Rule 214 of the Rules of Practice. Briefs to the Examiner have been filed by the parties and a statement of position has been filed by Pacific.

The Issues: The issues raised by the complaint are whether the operation of package tours by air between the points in question by respondents Hacienda and Henry E. Price are in violation of the provisions of Section 401(a) of the Act, and, if so, whether either or both respondents should be ordered to cease and desist from committing further violations of the Act.

Position of the Parties: Respondents' position is that they provide air transportation for guests of the Hacienda Hotel only, that such transportation is provided free of charge, that for this reason they are not engaged in the carriage of passengers for compensation or hire within the meaning of Section 101(21) of the Act, and that the provisions of Section 401(a) are, therefore, inapplicable and no certificate is required for the service.

They also take the position that the Bureau of Enforcement has failed to sustain its burden of presenting a prima facie case against either of them because of alleged variances between the allegations of the complaint and the proof. Thus, they point out that they are charged with violating Section 401 of the Federal Aviation Act which did not become effective until

January 1, 1959, whereas the bulk of the evidence presented by the Bureau relates to the service which they operated in 1958. They assert that since they are not charged with violating the Civil Aeronautics Act and since Section 401 of the Federal Aviation Act has no retroactive effect, evidence of violations committed in 1958 could have no probative value and should not have been received. In view thereof and since no investigation was made of their operation in 1959, respondents imply that the complaint should be dismissed. Respondents on brief renew a motion made earlier for dismissal of the complaint against respondent Price on the ground that the evidence shows him to be nothing more than a salaried employee of Hacienda.

Both the Bureau and Pacific take the position that the record conclusively establishes that both respondents are engaged in interstate air transportation as a common carrier for compensation or hire and that the Board should issue an order directing them to cease and desist from further violations of Section 401(a) of the Act. The Bureau also opposes dismissal of the complaint against respondent Price on the ground that as manager of Hacienda's flight division he is in reality the latter's agent in the conduct of the operation and asks that he be enjoined both individually and in all other capacities in order to prevent him from resuming operations in some other name.

Respondents: Las Vegas Hacienda, Inc. (Hacienda), a California corporation is one of a number of similarly named hotels, which is located in Las Vegas, Nevada. Its principal business is operating an hotel and providing entertainment for the public. Other hotels bearing the name Hacienda are located in Fresno,

Bakersfield, and Indio, California, and in 41 other locations in the East. All are separately incorporated. Mr. Warren Bayley is Chairman of the Board of the Hacienda hotels in Las Vegas and California and the gambling casino, which is separately incorporated and which operates under the name of Casion Operations, Inc. Respondent Henry Price is manager of the flight division of Hacienda and is a salaried employee.

The hotel consists of eight buildings, 363 rooms, a gambling casino, golf course, swimming pool, and other recreation facilities. Although separately incorporated the gambling casino is physically a part of the hotel. Hacienda entails an investment of approximately $6,000,000 and being a resort hotel it is dependent for patronage on guests coming primarily from cities in California.

Prior Method of Operation: Prior to March 1958 the air transportation here in question was performed by Hacienda Hotels-Motels, Room and Flight Reservations, Inc. (Hacienda Hotels-Motels), which was incorporated, among other purposes, to act as agent for Hacienda in the extension, promotion, and development of its hotel business. Hacienda Hotels-Motels promoted and sold champagne tours for Hacienda in the Los Angeles area. It performed all of the services incident to the operation of the tour flights except the physical operation of the flights which was performed under contract by U. S. Aircoach and other carriers. Operation of the flights was subject to the direction and control of Hacienda Hotels-Motels. Solicitation of tour patrons in the Los Angeles area was accomplished through various advertising media including newspapers, radio, brochures, etc. The price generally

charged for the tour was $25.00, plus tax. The entire operation was conducted under the direction and control of respondent Henry Price, president of Hacienda Hotels-Motels.

Hacienda Hotels-Motels continued to operate the tours until shortly after the decision in Hacienda Hotels-Motels, Rooms and Flight Reservation, Inc., and U. S. Aircoach Enforcement Proceeding, Docket 8462,[1] in which the Board found it to be operating as an indirect air carrier in violation of section 401(a) of the Civil Aeronautics Act of 1938, as amended, and ordered it to cease and desist from further violations of the Act.

Present Method of Operation: On or about March 4, 1958, Hacienda assumed and thereafter performed all of the duties and services incident to the tour operation theretofore provided by Hacienda Hotel-Motels and by the direct air carriers and thereafter transported all tour passengers in its own name and in its own aircraft. Hacienda initiated service between the Los Angeles area and Las Vegas on a frequency of one roundtrip with DC-3 aircraft. On or about July 3, 1958, the DC-3 was replaced with a DC-4 and in April 1959 it began operating two roundtrip flights daily utilizing both DC-3 and DC-4 aircraft.

In July, 1959, the service was extended to Santa Ana, California, on a frequency of six roundtrips per week and to Ontario, California, which was served primarily on weekends. Beginning on or about October 30, 1959, it initiated flights between San Francisco and Las Vegas on Monday, Wednesday, Friday, and Sunday of each week. The latter flights are operated with

[1] Decided February 19, 1958, Order E-12192.

pressurized Constellation aircraft and they differ from the regular evening tour only to the extent of providing the San Francisco patrons with a room at Hacienda and two bottles of champagne instead of one. The price of the San Francisco-Las Vegas one night tour is $40 per person double occupancy, plus tax, as compared to $36.85 per person double occupancy, plus tax, between Long Beach Burbank-Las Vegas.

Upon initiation of service by Hacienda in its own name Hacienda Hotels-Motels was dissolved and all operations by that company and by the direct air carriers were discontinued. Hacienda purchased and operated its own aircraft, employed its own crews, and the operation thereupon became the flight division of the hotel itself. The operation was taken over by Hacienda in order to satisfy the Board's objections to the previous operation,[2] and to bring it within the scope of the "primary business" doctrine which the Board held was inapplicable to the previous operation.

Upon acquisition of the operation Hacienda employed Henry Price as manager of its flight division and, although a salaried employee, his duties are similar in most respects to those which he performed as president of Hacienda Hotels-Motels. Mr. Price has complete charge of the flight operation and the 30 odd Hacienda employees engaged in that activity who are subject to his direction and supervision. Mr. Price registered Hacienda's DC-3 and DC-4 aircraft in the hotel's name with the Federal Aviation Agency and he has the responsibility for obtaining emergency air serv-

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[2] Hacienda Hotels-Motels, Rooms and Flight Reservations, Inc. and U. S. Aircoach Enforcement Proceeding, supra.

ice from other carriers when Hacienda's aircraft are unable to operate because of mechanical difficulty.

Hacienda personnel is employed at both Hacienda offices in the Los Angeles area and in Las Vegas. They perform virtually all of the duties and services required by the operation including ticket sales, passenger manifesting, check-in of passengers and baggage, and passenger ground service. All advertising is done pursuant to contract by an independent advertising agency. Fuel for aircraft is purchased directly from the Standard Oil Company of California and aircraft maintenance is performed under contract by American Airmotive, Inc., and Long Beach Airmotive, Inc.

Tour patrons are solicited from the general public through substantially the same media employed at Hacienda Hotels-Motels; namely, newspapers, radio, and brochures. The service is also made known to the public by a number of travel agents who sell the package tours on a commission basis. Advertisements which appeared in the Los Angeles Times during 1958 and 1959 were generally headed with the phrase "Fly Free to Vegas" in enlarged bold type. Underneath there appeared the name "Hacienda," the words "Champagne Tour," and description of the aircraft, and the various features of the package tour, flight schedules, and price of the tour.

Upon purchasing the package tours patrons are issued books of coupons which entitle them to, among other things, so-called free air transportation between Long Beach-Burbank and Las Vegas. The price of the evening tour, which has been changed on several occasions, ranges between $22.50 and $27.50 and upon arriving in Las Vegas each patron upon surrender of

the individual coupons receives in return therefor the particular service or benefit specified therein. Two of the coupons are for transportation between the airport and the Hacienda Hotel, two for the use of the Hacienda golf course, one for the hole-in-one contest, one for a bottle of special vintage Hacienda champagne, and one for a buffet dinner. In addition each tour patron is given $5.00 in cash to spend for food, at the bar or in the gambling casino. The aggregate price of all of the individual items of the tour amount to $27.50, which is the price customarily charged for the tour.[3]

In addition to the foregoing specific benefits tour patrons are served champagne en route to Las Vegas. The DC-4 passengers are entertained with piano music and once each week a fashion show is held aboard the aircraft, all without extra charge. Patrons also receive a guaranteed reservation for the floor show at the the New Frontier Hotel which is owned and controlled by Hacienda's chief executive officer, Mr. Warren Bayley.

Upon checking in at the Hacienda ticket counter in Burbank patrons are issued boarding passes which are surrendered to the gate attendant before boarding the aircraft. Their names are then checked off on the passenger manifest and upon arriving in the Las Vegas Airport they are met by a Hacienda representative who escorts them to a waiting bus which transports them to the Hotel. Luggage is transported to the Hotel in a separate vehicle which is owned by Hacienda. Board

[3] The price of the individual items are as follows: casino $5, bottle of champagne $12.50, bus service $1.50, golf course $4, hole-in-one contest $2, buffet dinner $2.50, total $27.50.

ing passes for the return flight to Burbank are issued in the Hotel lobby approximately one to two hours before flight time. Hacienda as a matter of routine assigns 39 rooms daily to the DC-4 aircraft and patrons are required to pay for the rooms at the same time they purchase the package tour.

Although Hacienda advertises and insists that the air transportation to and from Las Vegas is free, it is noted that regardless of whether the patron reserves a room at the Hotel he is not permitted passage on Hacienda's aircraft without purchasing and paying for the package tour. The alleged purposes of this requirement are to insure that only guests of the Hotel are carried on Hacienda flights and to discourage the use of the flights by persons seeking only low cost transportation. While conceding the possibility that many persons may use the service for that purpose Hacienda still considers them as guests of the Hotel because of the likelihood of their taking advantage of some of the tour benefits, such as the free meal and the $5.00 cash refund.

Hacienda contends that the package tour is nothing more than a promotional device to stimulate business at the Hotel. The vast majority of the guests utilize surface transportation traveling to and from the Hotel. The air package tours account for only nine per cent of the Hotel's guests.

Hacienda insists that it receives no income from the tours and it regards the operating expenses of the tour as being a part of the operating expenses of the Hotel itself. In support of its claim that the transportation is free Hacienda calls attention to the facts that the aggregate value of the individual features of the tour exceeds the price charged for the tour; that no refund is

made of any part of the purchase price regardless of whether the patron uses other means of transportation, and that no transportation tax is paid to the Bureau of Internal Revenue.

In this connection respondent notes that this is but one of a number of package tours offered periodically to guests of the Hotel. The distinguishing difference between the instant tour and that offered guests arriving there by private automobile is that instead of being given a coupon book the latter are given trade checks having a value of fifty cents each.

Although the gambling casino does not contribute to the operating expenses of the flight division, it shares substantially in the revenues produced by the patrons of the champagne tours and it produces about the same amount of revenue as all of the other hotel facilities combined. Hacienda has been a profitable operation.

Analysis of the Evidence: The question presented here for determination is whether the champagne tours being operated by Hacienda constitute air transportation within the meaning of Section 401(a) as that term is defined in Section 101(21) of the Act. If so, respondents are in violation of Section 401(a) since neither possesses either a certificate or exemption order from the Board authorizing the operation of such service. Section 401(a) of the Act provides:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

The term "air transportation" as used in Section 401(a) and the term interstate air transportation is defined in Section 101(21) as:

". . . the carriage by aircraft of persons or property as a common carrier for compensation or hire . . ."

Hacienda contends that since no charge is made for transportation its operation simply does not come within the foregoing provisions of the Act and that it does not constitute air transportation within the meaning of Section 401(a). It states that the service is not operated for profit but rather is operated for the sole purpose of promoting and developing its principal business of operating a hotel and providing entertainment for its guests. The air package tours, it states, are predicated solely on the patrons purchasing a minimum package consisting of goods and services other than transportation for which the patron is charged the same price paid by any other guest regardless of what means of transportation he uses in traveling to and from the Hotel. It contends that being a promotional device the cost of the package tour is shared by all patrons of the Hotel and not just by those who use its air service. Hacienda regards its transportation service as being free in the same sense as any other item which is given away free by other businesses in their advertising programs, such as free trips, free automobiles, etc.

As respondents recognize in their brief the term "for compensation or hire" is not defined in the Act and there is no explanation of that term in the legislative history of the Act. The Board, however has previously construed the term "compensation" to mean a payment for service which does not necessarily include an element of profit[1] and in the previous Hacienda

[1]Consolidated Flower Shipments Ba Area Violation, 16. CAB. 804,819(1953).

case, Hacienda Hotels-Motels, supra, it rejected the respondents' argument that if a carrier should operate at a loss it cannot be deemed a common carrier for hire. In so doing the Board referred to an earlier decision of the Interstate Commerce Commission[5] in which the motor carrier operation there was held to be "for hire" although it was being operated at a loss. These cases effectively dispel any doubts that might still remain with respect to this aspect of the question and it can now be clearly stated that regardless of whether such service is being at a profit or at a loss it has no bearing on the question of whether it is being operated for compensation or hire.

Hacienda contends, nevertheless, that the above-mentioned cases are not in point. Thus, it argues, the tour flights are operated in furtherance of its principal business of operating a hotel and providing entertainment. It asserts that the facts and circumstances involved in its operation more nearly resemble those in several cases decided by the Interstate Commerce Commission under the motor carrier Act of 1935 (Part II of the Interstate Commerce Act) in which the Commission found the transportation not to be for compensation and in each such case the operators were found to be a private carrier rather than a common or contract carrier within the meaning of that Act.

Hacienda relies specifically on the Commission's decision in Woitishek Common Carrier Application[6] and supporting cases referred to therein. In that case the

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[5] Schenley Distillers Motor Division, Inc., Contract Carrier Application, 44 M.C.C. 171, 173 (1944).

[6] 42 M.C.C. 193, 200-201 (1943).

applicant was engaged in the business of purchasing and selling building materials. His headquarters and principal warehouses were located in Las Vegas, Nevada, and he supplied material for construction projects located at points in Nevada on and south of U.S. Highway 40. Delivery of such material was made from applicant's own yard or direct from supply points in nearby states either by for-hire carriers, rail or motor, or by applicant in his own trucks.

Approximately 40 per cent of applicant's gross revenues were realized from the direct sale of supplies upon prior order of a contractor which were delivered directly from the point of supply to point of use in applicant's own trucks. Applicant owned all of the materials which he transported and the selling price thereof was computed by adding to their cost at the point of supply, applicant's profit plus an amount deemed sufficient to cover the cost of transportation.

While the commission recognized that each case must be determined upon its own particular facts its decision in the Woitishek case turned on a showing that the applicant's principal business was the selling of building materials; that the property transported was property which he owned; that the transportation was not performed for profit but rather was incidental to and in furtherance of his principal business of selling building materials, and that there was no holding out of transportation to the general public.

In holding the applicant to be a private rather than a common or contract carrier the commission enunciated the primary business doctrine as follows: ". . . it is apparent that a private carrier within the meaning of Section 203 (a) (17) is one who transports . . . prop

erty of which he is the owner, lessee, or bailee when such transportation is for the purpose of sale, lease, rent, or bailment, by the transporter, or in the furtherance of any commercial enterprise of the transporter other than transportation for compensation."

Notwithstanding Hacienda's contention that its tour service has all of the attributes of the service in the Woitishek case, no case has been cited wherein the Commission has applied the primary business test to cases involving the transportation of persons and although the Board has never had occasion to pass upon this question directly it noted in its opinion in the previous Hacienda case that even under the Interstate Commerce Act the test appeared to be restricted to carriers of property who furnish transportation services in furtherance of their primary business enterprises.

White it is beyond dispute that Hacienda's principal business is that of operating a hotel and furnishing entertainment, it is obvious that in no sense could it be the owner, bailee, or lessee of the passengers which it transports. Although this fact alone is sufficient to cast doubt on the applicability of the primary business doctrine to the facts in this case, in view of Hacienda's other contentions on the subject, mentioned earlier herein, and other factors which distinguish the Woitishek case from the instant case, a further discussion of the matter appears necessary.

Thus, one of the most important distinguishing differences between the facts of these two cases is Hacienda's holding out of service to the general public. The Commission noted in the Woitishek case that this is one of the important attributes of common carriage and it can be concluded from the full text of the Com-

mission's decision in that case that if there had been a holding out of service to the public its decision would have been different. Insofar as the instant case is concerned there can be no dispute that Hacienda's service has been and is being held out to the general public. As has been indicated previously, tour patrons are procured through advertising in newspapers, radio, and brochures in the Los Angeles area and through solicitation by travel agents and by Hacienda's own counter personnel. This in effect constitutes a holding out to the entire population of the Los Angeles area that Hacienda is willing and able to accommodate all persons who apply for and purchase the champagne tours. The fact that the Los Angeles area constitutes a substantial segment of the general public is manifest from the Board's decision in the prior Hacienda case in which it concluded that hotel patrons alone constitute such a considerable portion of the public that services exclusively offered such patrons are deemed to be in common carriage. In support of this conclusion the Board referred to several prior decisions of the court and the Interstate Commerce Commission which reached the same conclusion.[7] In one such case, Shores and Brown case, the facts underlying the transportation are on all fours with the facts in the instant case except that in the for-

[7]Terminal Taxicab Co. v. District of Columbia, 241 U.S. 252 (1916); Shores and Brown Common Carrier Application, 26 M.C.C. 243 (1940); Huff Common Carrier Application, 16 M.C.C. 159 (1939), modified, 27 M.C.C. 643 (1941).

mer case a portion of the one-price vacation admittedly covered the cost of the motor trip between New York City and the Hillside Lodge Hotel.[8]

However, regardless of the finding that hotel guests alone constitute a substantial segment of the public there have been instances where non-guests have used Hacienda's service to Las Vegas and Hacienda's board Chairman conceded the possibility that many persons might purchase the tour merely to obtain low cost transportation. In addition, prospective patrons were informed by Hacienda's travel agents that non-guests were eligible to purchase the tour and one such agent reminded the patron that Hacienda's fare was less than that of the certificated air carriers. Hacienda's efforts to discourage the use of its service by non-guests which consisted of distributing baggage and the issuance of

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[8]In Shores and Brown Common Carrier Application, supra, applicants, the owners and operators of Hillside Lodge, a resort hotel proposed to operate a one-price vacation for purposes of increasing patronage of the hotel. The vacation included board, lodging, and transportation between New York City and the lodge over a scenic route in a sedan which appliants leased for that purpose. Applicants employed an agent in New York to sell the vacations on a commission basis, the driver was an employee of the hotel, no passengers were picked up or discharged en route, no person was accepted who had not purchased the one-price vacation, and an estimated $13.00 of the purchase price was allocated to the roundtrip transportation. The commission found that there had been a holding out of transportation to the general public as a common carrier for compensation and that the restriction limiting the sale of the service to only those who proposed to use applicant's non-transportation facilities did not destroy the public nature of the service.

boarding passes for the return trip at the Hotel only, while commendable, do not appear to be sufficiently stringent to accomplish that purpose.

Hacienda contends, nevertheless, that under any interpretation of the language of Section 401 its tour service could not possibly be found to be for compensation for the reason that no charge is made for the transportation. This raises the question of whether Hacienda may for purposes of its own convenience sever one of a number of items from the tour package and elect not to charge for it while charging for all of the remaining items of the tour. The answer to this question is especially significant here since the cost of the transportation in all probability equals or exceeds the aggregate cost of all of the other items of the tour and if Hacienda were permitted to sell its service in this manner it could avoid regulation under Section 401.

The weight of authority indicates that the tour contract is not divisible as alleged and the price which the patron pays for the package tour must be considered as including compensation for transportation. The Board recognized in its opinion in the previous Hacienda case that the air transportation is the principal feature of the tour and the evidence here is substantial that some people purchase the tour merely to obtain transportation. While it may be conceded that Hacienda does not profit directly from transportation it obviously hopes to profit from the tour patrons' patronage of the gambling casino since that facility accounts for approximately one-half of the Hotel's revenues and it is so found. In light thereof, Hacienda's contention that no profit motive has been shown is rejected.

Aside from the foregoing conclusion, however, the Board stated in the Pan American Ferry Flight Case[9] that when all other necessary elements of common carriage are present a person cannot avoid regulation under the Act by the simple device of not making a charge for transportation on certain flights. In this and in a number of other leading cases the courts have uniformly held that the question of whether a person is a common or private carrier is one which must be determined upon the facts and that such determination will be made on the basis of what the carrier is actually doing and not upon what it claims to be doing.[10]

In other cases where the courts have had occasion to consider and pass directly upon the question of "separability" of contracts they have held in cases involving facts and circumstances similar to those present here that the contracts were indivisible. Thus, the court in U. S. v. Bethlehem Steel Corp.[11] stated that: "whether a number of promises constitute one contract or more than one is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out." The Supreme Court of Pennyslvania in

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[9] 18 CAB 214, 219 (1953).

[10] Rural Electric Co. v. State Board of Equalization et al., 120 P 2d 741 (1942); Dairymen's Co-Op Sales Ass'n v. Public Service Comm. 318 PA. 381, 177A. 770, 773, (1935); Phillips v. Public Service Comm. 127 PA. Sup. 341, 191A641 (1957); McKay v. Public Utilities Commission, 104 Colo. 402, 91 P.2d. 965 (1935); Taussig v. Moffat Tunnel Water & Development Co., 106 Colo. 384, 106 P 2nd 363 (1940).

[11] 315 U.S. 289, 298 (1942).

Lucesco Oil Co. v. Brewer[12] stated in substantially the same vein: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable . . . But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." In like manner the Supreme Judicial Court of Massachusetts in E. I. DuPont De Nemours & Co., Inc. v. Kaufman & Chernick, Inc.[13] held a contract of sale inseparable and entire in a suit for an injunction against the retailer under the fair trade law where the retailer sold the customer an automobile tire and a gallon of Zerex anti-freeze for the price of the tire alone. The court there stated "The money paid the defendant by the purchaser was paid not for the tire alone, but for both items. Legally and economically the transaction amounted to a combined sale of both the Zerex and the tire for a single price."[14]

The facts and circumstances upon which the courts based their decisions in the foregoing cases are clearly analogous to those in the instant case and there is

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[12]66 PA 351, 354.

[13]148 NE 2d 634, 636, (1958).

[14]The court stated in another case, Trainian v. Rappaport, 41 F 2d 336, 338, "aside from the terms of the contract and intention of the parties a test of severability is that if the consideration is single the contract is entire, but if the consideration is expressly or by implication apportioned, the contract may be, yet even then need not necessarily be, regarded as severable."

nothing in this record which would support the contention that the champagne tour would be just as attractive to and as well patronized by the public if transportation were not offered as part of the tour.

The fact that air transportation is by far the most important item in the package may be seen by reference to the current roundtrip first class and coach fares of the certificated carriers between Los Angeles and Las Vegas of $30.20 and $30.50, respectively. Moreover, the fact that Hacienda advertises the transportation as free affords still another strong indication that it is the principal inducement for purchase of the tour. The weight of authority points overwhelmingly to the conclusion that the Hacienda champagne tour is one, entire, and indivisible, and that it constitutes interstate common carriage for compensation or hire within the meaning of Section 101(21) of the Act, and it is so found.

Hacienda argues, however, that even assuming the inapplicability of the primary business doctrine to the facts of this case, its service still cannot be found to be for compensation or hire under the broader language of Section 101(20) of the Act which unlike Subsection (21) includes in the definition of "interstate air commerce" the language "the carriage by aircraft of persons or property for compensation or hire, * * * or the operation or navigation of aircraft in the conduct of furtherance of a business or vocation, in commerce between * * *."[15] Although Hacienda concedes that Section 401(a) of the Act is qualified by the aforesaid subsection (21) rather than subsection (20),[16] it,

[15]Underscoring supplied.

[16]Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592 (1948).

nevertheless, contends that since the legislative history of the Act indicates that Congress had originally intended requiring certificates for all classes or carriage falling within the provisions of subsection (20) and having included the foregoing underscored language therein, and having first included and then excluded such language from subsection (21) for the purpose of giving the two subsections a different scope and effect, it (the Congress) must have intended that subsequent sections of the Act, allegedly qualified by subsection (20), should encompass not only carriage "for compensation or hire" but also "operation * * * of aircraft * * * in the * * * furtherance of a business." For these reasons Hacienda contends that the statutory language and underlying legislative history of the Act supports the conclusion that while its activities may constitute interstate air commerce, they do not constitute interstate air transportation for which a certificate is required.

Contrary to Hacienda's contention there is nothing in the Act or for that matter the legislative history of the Act which indicates that the Congress intended that Subsection (21) should be qualified in any respect by Subsection (20). It is obvious from a reading of the language of these subsections in light of the provisions of Section 401(a) that Congress intended, for purposes of jurisdiction under the various provisions of the Act, to provide for separate classifications of carriage, i.e., common carriage in Subsection (21) and all other classes of carriage in Subsection (20). That this is so is readily apparent from the inclusion of the words "as a common carrier" in the definition of interstate air transportation in Subsection (21) whereas those words are omitted from the definition of inter-

state air commerce in Subsection (20). Since the said underscored language was included in Subsection (20) and omitted from Subsection (21) it can only be assumed that in so doing Congress intended to preclude any possibility of considering interstate air transportation as a common carrier for compensation or hire as being private carriage, and it is so found. If Congress had intended otherwise it may be assumed that it would have used the term "air commerce" instead of "air transportation" in Section 401(a), and not having done so there is no basis whatever for concluding that Section 401(a) or Subsection (21) are in any way qualified by Subsection (20), and it is so found.

Finally Hacienda urges adoption of the primary business doctrine if for no other reason than that it is consistent with pertinent legislative history and underlying policies of the Act. It contends that the specialized service which it operates is not offered by the certificated carriers; that its flights are operated at times of the day when the certificated carriers have no flights; that many of its passengers would not make the trip if regular fares were charged; that many passengers have been introduced to air transportation for the first time and presumably may be expected to use air transportation to travel to other points in the future; that the service being limited to hotel guests is virtually non-competitive with the services of the certificated carriers; and that being subsidized by the Hotel the service is not operated at public expense.

The policy considerations of the Act relied on by respondent could not possibly justify either the favorable application of the primary business doctrine or the continuance of an operation which is unlawful under Section 401(a). The primary business doctrine has

never been used to clothe a person with authority to operate a particular service but rather has been used by the Commission as a test to determine the classification of carriage in which the operator is engaged. So far as it is known it has only been applied in cases involving the transportation of property and has never been held to apply to the transportation of persons. The doctrine is clearly inapplicable to the facts in this case regardless of the fact that the service is being operated to enhance Hacienda's hotel business. While policy considerations under Section 102 of the Act may play an important role in licensing proceedings under Section 401 they cannot be relied upon in any manner whatsoever to perpetuate an operation which is unlawful. That fact is so clear as to require no further discussion. On the basis of the foregoing considerations it is concluded that the latter contention is without merit; therefore, it is rejected.

Hacienda also charges error in the receipt of evidence with respect to violations committed in 1958 for two principal reasons (1) Section 401 of the Federal Aviation Act of 1958 which respondents are charged with violating did not become effective until January 1, 1959, and the Act has no retroactive effect; and (2) any violation which occurred in 1958 could only have violated Section 401 of the Civil Aeronautics Act of 1938, and since that Act is no longer in effect, and since respondents have not been charged with violating the provisions of that Act, they are guilty of no violations. Presumably respondents are renewing their earlier motion to strike all evidence relating to the 1958 violations not only on the foregoing grounds but for the additional reasons that they cannot be charged with violating a law which is no longer in effect and

that the Bureau of Enforcement has not proved violations by them in 1959. Upon consideration of the facts and arguments presented in support of the motion, it is denied. First of all, it is noted that there has been no change in the language of Section 401(a) and secondly, Section 109 of Title 1 of the U. S. Code specifically provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *"

The Federal Aviation Act of 1958 not only contains no such provision, but ER-248 of the Board's Economic Regulations, adopted January 13, 1959, provides:

"The term 'Act' means the Federal Aviation Act of 1958. All orders, certificates, rules, regulations, notices, and other documents issued by the Board or under its authority and referring to the Federal Aviation Act of 1958, or to certain provisions thereof, shall be deemed to refer also to the Civil Aeronautics Act of 1938, as amended, or to the corresponding provisions thereof, to the extent the latter Act, or corresponding provisions thereof, may be applicable."

Respondent's contention that all evidence of violations committed in 1958 could have no probative value in this case is, accordingly rejected, as being without merit.

Respondent's contention that the Bureau of Enforcement has failed to prove that they violated the Act in

1959 is likewise rejected for the reason that by their own admission the champagne tour was operated continuously throughout the year 1959 and was still being operated at the time of hearing herein in November 1959. Evidence of violations subsequent to the filing of the complaint on June 15, 1959, was also properly received because the complaint alleges that both respondents were continuing to violate the law; therefore, they have been on notice since the date of the filing of the complaint that evidence with respect to such violations might be presented and they have been accorded full opportunity to rebut such evidence.[17]

Respondents have also moved to strike evidence which was received with respect to flights operated between Ontario, Santa Ana, and San Francisco, California, on the one hand, and Las Vegas on the other, which they have not been charged with operating in the complaint. What respondents neglected to state in connection with this motion is that such evidence was received only for the purpose of showing how the tour operation has expanded since the filing of the complaint and so that there might be some basis for determining what effect, if any, Hacienda's service might have on the operations of the certificated carriers if it were allowed to continue. No showing has been made wherein respondents have been prejudiced by the receipt of this evidence; accordingly, the motion is without merit and it is, therefore, denied.

Respondents also moved to dismiss the complaint against Respondent Henry Price on the grounds that

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[17]See Arrow Airways, Enforcement Proceeding 12 CAB 405, 410 (1951).

he is only one of a large number of Hacienda employees engaged in operating the tour service; that he is only a salaried employee of Hacienda in charge of its flight division; that he has nothing whatever to do with soliciting, advertising, or selling the package tours; and that the evidence shows that his only function is supervising the operation of the tour flights. In light thereof respondents assert the Bureau of Enforcement has failed to prove that Respondent Price has engaged in air transportation as agent for Hacienda; therefore, the complaint against him must be dismissed.

While it is true that Mr. Price is carried on Hacienda's payroll as a salaried employee other evidence of record reveals that his duties go beyond that of the ordinary employee and unless enjoined from further activity along this line the operation might be resumed under another name with Respondent Price playing just as important a role in the conduct of the service as before. Thus, the record in the previous Hacienda case shows that prior to becoming president of Hacienda Hotels-Motels on October 10, 1950, Henry Price made all of the arrangements for and conducted the evening in Las Vegas tours for the Hotel Showboat in Las Vegas. After becoming president of Hacienda Hotels-Motels he arranged for and conducted tours for the Hacienda Hotel and at the present time performs substantially the same duties as an employee of Hacienda. As indicated previously as manager of Hacienda's flight division he registered aircraft in Hacienda's name with the Federal Aviation Agency; he contracts for aircraft maintenance; and charters other aircraft to operate the tours when Hacienda's aircraft are unable to operate. In short, Mr. Price's duties and control of the operation are essentially the same now

as they were when he was conducting tours in his own name as president of Hacienda Hotels-Motels.

From a review of the authorities cited by the Bureau of Enforcement on brief[18] there appears to be no doubt that Mr. Price acts as agent for Hacienda in many of business transactions which he handles for it. However, even if it should appear that Mr. Price were not an agent of Hacienda, since he has engaged in tour operations in several capacities during the past few years and since there is a possibility that he may resume operations in some other capacity unless legally restrained, the Board should issue an order directing him to cease and desist from engaging in air transportation in any capacity. The Board was confronted with a similar situation in the Twentieth Ceintury A.L. et al., Compliance Proceeding,[19] and there it directed several persons both individually and as partners in one or more of the respondent companies to cease and desist from engaging in their unlawful activities. On the basis of the foregoing and other considerations of record the motion to dismiss the complaint against Respondent Price is denied.

On the basis of the foregoing facts and all of the evidence of record in this proceeding it is found:

That Las Vegas Hacienda, Inc. is engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand and Las Vegas, Nevada, on the other without authority from the Board in violation of Section 401(a) of the Act.

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[18] 2 C.J.S. 1024; Kelly v. United States, 258 Fed. 392, 401 (1919).

[19] 21 CAB 133 (1955).

That Henry F. Price is engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand and Las Vegas, Nevada, on the other without authority from the Board in violation of Section 401(a) of the Act.

That Las Vegas Hacienda, Inc. and its agents, successors, and assigns and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc. should be ordered to cease and desist from violating Section 401(a) of the Act.

/s/ RICHARD A. WALSH,
Hearing Examiner.
Hearing Examiner

Proposed Order attached.

Board's Opinion and Order.

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the

Docket 10607

In the Matter of:

LAS VEGAS HACIENDA, INC.

and

HENRY F. PRICE.

Enforcement Proceeding

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the entire record, having issued its opinion, con-

taining its findings, conclusions, and decision, which is attached hereto and made a part hereof;

It is Ordered, That on and after 12:01 a.m. EDST, . . . Las Vegas, Hacienda, Inc., its agents, successors and assigns, and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc., cease and desist from engaging directly or indirectly in air transportation within the meaning of Sections 1 (10) and 1 (21) of the Federal Aviation Act of 1958, in violation of Section 401(a) of the Act.

By the Civil Aeronautics Board:

[Seal]

[Title of Board and Cause.]

Decided: August 12, 1960

Las Vegas Hacienda, Inc., engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand, and Las Vegas, Nevada, on the other, without authority from the Board, in violation of Section 401(a) of the Act.

Henry F. Price engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand, and Las Vegas, Nevada, on the other, without authority from the Board, in violation of Section 401(a) of the Act.

Las Vegas Hacienda, Inc., and its agents, successors and assigns and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc., ordered to cease and desist from violating Section 401(a) of the Act.

Appearances:

Same as in Initial Decision.

OPINION

By the Board:

This is an enforcement proceeding against respondents Las Vegas Hacienda, Inc. (Hacienda), whose principal business is the operation of a resort hotel at Las Vegas, Nevada, and Henry F. Price, manager of Hacienda's flight division. The proceeding was instituted upon complaint filed by the Office of Compliance (presently the Bureau of Enforcement) alleging that since about March 4, 1958, respondents have engaged in air transportation within the meaning of the Federal Aviation Act, by carrying persons by aircraft on "package" tours[1] between Las Vegas and California points, as a common carrier for compensation for hire. The complaint charged that such transportation is in violation of Section 401(a) of the Act in that respondents do not hold appropriate certificate authority from the Board, and requested that respondents be ordered to cease and desist therefrom.

After notice and hearing, Examiner Richard A. Walsh issued his Initial Decision finding that each respondent is engaged in and described air transportation, between Los Angeles and Burbank, California, on the one hand, and Las Vegas, on the other hand, in violation of Section 401(a). He concluded that Hacienda, its agents, successors, and assigns, and Henry F. Price, "individually and as agent and or manager of the flight

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[1]The record shows that purchasers of these "package" tours at Long Beach or Los Angeles are issued coupon books which entitle them to "free" transportation on Hacienda's own planes to Las Vegas and return, bus transportation between the Las Vegas airport and the Hacienda hotel, and, among other things, the use of the Hacienda golf course, champagne, and a buffet dinner.

division of Las Vegas Hacienda should be ordered to cease and desist from such violations.

Exceptions to the Initial Decision and a brief have been filed by respondents, jointly. In support of the Initial Decision, Enforcement relies upon its brief to the Examiner, and the intervener Pacific Air Lines, Inc., refers to its written statement filed with the Examiner. The Board has heard oral argument, and the case now stands submitted for decision.

After careful consideration of respondents' exceptions and brief, and the entire record, we agree with and adopt as our own the Examiner's findings and conclusions set forth in the Initial Decision, attached hereto as an Appendix. Therein, the Examiner discussed extensively the evidence and the applicable law, all of which amply support our decision here. Respondents' exceptions demonstrate no error in the Initial Decision and, essentially, raised only issues which were presented to and considered by the Examiner, and correctly passed on in the Initial Decision.[2]

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[2] One matter raised for the first time by respondents' exceptions is the alleged vagueness of the Examiner's recommended cease and desist order, which we are adopting. Respondents claim that it is so vague and uncertain as to fail to apprise either respondent of the acts or conduct enjoined, and that in its present form it could be construed to bar respondent Price from all phases of the aeronautical field.

This contention is without merit. The Initial Decision sets forth with sufficient clarity and detail the transportation operations which are prohibited. Any possible doubt as to what constitutes the enjoined operations, or comprises any concomitant phase thereof, can be resolved by reference to that decision. (See Consolidated Flower Shipments, Inc.—Bay Area et al., 17 C.A.B. 45, 46 (1953).)

In view of the foregoing considerations and all the facts of record, we find:

1. That Las Vegas Hacienda, Inc., is engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand, and Las Vegas, Nevada, on the other, without authority from the Board, in violation of Section 401(a) of the Act;

2. That Henry F. Price is engaged in interstate air transportation as a common carrier for compensation or hire between Los Angeles and Burbank, California, on the one hand, and Las Vegas, Nevada, on the other, without authority from the Board, in violation of Section 401(a) of the Act; and

3. That Las Vegas Hacienda, Inc., and its agents, successors, and assigns and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc., should be ordered to cease and desist from violating Section 401(a) of the Act.

An appropriate order will be issued.

Gilliland, Chairman; Gurney, Vice Chairman, Minetti, Boyd and Bragdon, Members of the Board, concurred in the above opinion.

Served Aug. 12, 1960.

[Title of Board and Cause.]

Board's Order of Reconsideration.

ORDER

Respondents have filed a petition seeking reconsideration of the Board's Opinion and Order (Order E-15648) decided August 12, 1960, which ordered respondents to cease and desist, on and after October 11, 1960, from engaging in air transportation in violation of the Act. Respondents also filed with the Board a petition to stay the effectiveness of such order pending the Board's decision on their petition for reconsideration, or, in the event such petition is denied, pending judicial review. The Board's Bureau of Enforcement has filed objections to the petition for a stay.

Upon consideration of the petition for reconsideration and Enforcement's answer, the Board finds that respondents are not entitled to the relief requested. Nothing in the petition demonstrates error in the Board's Opinion and Order. No new matters, not previously considered by the Board, are presented nor is it otherwise shown that reconsideration is warranted.

In their request for stay, respondents plead that imposition of the order, even for a limited period, would result in irreparable financial difficulties. They claim, among other things, that respondent Hacienda would be required to disburse some $63,000 monthly under its fixed obligations on idle planes and equipment, and to its employees, pending final review of the case. In view of the probable financial impact our order would

have on the respondents and, in view of respondents' pending petition for judicial review of our Opinion and Order,[1] we have decided to stay the effectiveness of that order pending a final determination by the court.

Accordingly it is Ordered:

1. That respondents' petition for reconsideration herein be and it hereby is denied; and

2. That the effectiveness of Board Order E-15648 herein, be and it hereby is stayed, such stay to continue until ten days after the reviewing court shall issue any mandate or judgment affirming such order.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER,
Secretary.

[Seal]

[1] Las Vegas Hacienda, Inc., et al. vs. C.A.B., C.A. 9, No. 17081, filed September 19, 1960.

Opinion of the Ninth Circuit Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Las Vegas Hacienda, Inc. and Henry F. Price, Petitioners, vs. Civil Aeronautics Board, Respondent. No. 17,081 Jan. 16, 1962.

On Petition for a Review of an Order of the Civil Aeronautics Board.

Before: Merrill and Browning, Circuit Judges, and James Carter, District Judge.

Browning, Circuit Judge:

Las Vegas Hacienda, Inc. operates a resort hotel at Las Vegas, Nevada. Over a period of years it has advertised and sold in the Los Angeles area a "package tour" which includes a "free" airplane ride to and from Las Vegas. The transportation is provided in planes owned by Hacienda and operated by its employees through its "Flight Division," managed by Henry F. Price. The Civil Aeronautics Board has held that Hacienda and Price are engaged in "the carriage by aircraft of persons or property as a common carrier for compensation or hire" in interstate commerce without the certificate of public convenience and necessity required by the Federal Aviation Act, and has ordered them to cease and desist.

Petitioners challenge both the Board's power to issue the order, and the form in which the order is cast. As to the Board's power, they argue that they are not subject to economic regulation under the Act because the transportation they provide is merely incidental to their resort hotel business. As to form, they argue that the Board's order is so vague and general that it fails to give fair notice of the conduct which it prohibits.

We conclude that the Board's classification of Hacienda as a "common carrier for compensation or hire" required to be certificated is supported by substantial evidence and soundly based in law, and that the Board's cease and desist order provides fair notice of what it prohibits when read in the light of the Board's opinion. We further conclude that the record does not contain substantial evidence to support the Board's order with respect to Price. This portion of the Board's order is stricken, and the Board's order is otherwise affirmed.

I

The Federal Aviation Act[1] provides for broad economic regulation[2] of "air transportation."[3] The Civil Aeronautics Board is under an affirmative statutory duty to exercise its regulatory powers over "air transportation" so as to foster sound economic conditions, promote economical and efficient service at rea-

[1]The Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 et seq., is, for purposes of this case, a recodification of the Civil Aeronautics Act of 1938, 52 Stat. 973. The two Acts are referred to interchangeably in this opinion as "the Act."

[2]Entry into the business of air transportation is controlled by the Board through the issuance of certificates of convenience and necessity (49 U.S.C. § 1371); air carriers are required to establish, file, and adhere to tariffs reflecting reasonable and nondiscriminatory rates, regulations, and practices (49 U.S.C. §§ 1373, 1374); the Board may suspend unjust or unreasonable rates or practices and prescribe lawful ones (49 U.S.C. § 1482); the Board may prescribe industry accounting practices and require reports (49 U.S.C. § 1377); the Board must approve mergers, acquisitions, and certain interlocking relationships (49 U.S.C. § 1378).

[illegible] Section 401(a) of the Act (49 U.S.C. § 1371(a)), with which this proceeding is directly concerned, states that no carrier shall engage in air transportation without a certificate of public convenience and necessity issued by the Board.

sonable charges, and avoid destructive competitive practices.[4] The legislative history of the Act emphasizes the importance attached by the Congress to the achievement of these purposes.[5] Obviously the economic regu-

[4] 49 U.S.C. § 1302 reads in part:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * * * * *

(b) The regulation of air transportation in such manner as to * * * foster sound economic conditions in, such transportation * * *

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

[5] H.R. Report No. 2254, 75th Congress, 3d Sess., after describing conditions in the industry, states (p. 2):

"The result of this chaotic situation of the air carriers has been to shake the faith of the investing public in their financial stability and to prevent the flow of funds into the industry. Col. Edgar S. Gorrell, president of the Air Transport Association, representing substantially all of the scheduled American-flag air lines, testified before your committee during the public hearings on H. R. 9738 that $120,000,000 of private capital has been invested in the present air-transport system and that 50 percent of this investment has been lost. He further testified that unless legislation is enacted which would give the carriers reasonable assurance of the permanency of their operation and would protect them from cutthroat competition, a number of the air lines would soon be in serious financial trouble.

H. R. 9738 would prohibit any person from operating as a common carrier by aircraft unless such person holds a certificate of convenience and necessity, and provides that the rates, regulations, and practices of such air carriers shall be subject to regulation. Thus, if this legislation is enacted, the air carriers will be able to operate on a stable basis, their routes secured by a certificate of convenience and necessity, which may be revoked only for cause, and their rates regu-

lation contemplated by the statute can be effective only if the commercial activity to which it is made applicable—"air transportation"—represents a reasonably discrete market in practical business terms. The proper interpretation of this statutory term is therefore of crucial importance in the administration of the Act.

So far as here pertinent, the term "air transportation" is ultimately defined by the Act as "carriage by aircraft of persons or property as a common carrier for compensation or hire * * *."[6] The term "common carrier," which is central in this statutory definition of "air transportation," is an ancient one in our law and has been applied in many legal and factual contexts. It is not surprising that the numerous decisions defining the term are somewhat less than harmonious. The fact is that these precedents leave a considerable area of choice which the Board necessarily exercises in applying the broad definition of the statute to particular carriers to determine whether they are subject to regulation.

Whether the Board has chosen correctly in any given instance is, of course, subject to review by this court, for "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U. S. 358, 369 (1946). It is equally clear, however, that the Board's decisions

lated so as to eliminate cutthroat competition among themselves * * *. Provision is also made for requiring air carriers to cease and desist from engaging in unfair competition and unfair or deceptive practices."

[6] 49 U. S. C. § 1301 (10) reads:

"'Air transportation' means interstate * * * air transportation, or the transportation of mail by aircraft."

49 U. S. C. § 1301 (21) reads:

"'Interstate air transportation' * * * means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft * * *, in interstate commerce."

in these cases involve the application of technical knowledge which the Board, and not the court, is presumed to have. We understand that in these circumstances we are to affirm the Board's action if it has "'warrant in the record' and a reasonable basis in law." *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 131 (1944). And see *N.L.R.B. v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269 (1956); *Swift & Co. v. United States*, 316 U.S. 216, 224-225 (1942); *Shields v. Utah-Idaho Central R. Co.*, 305 U.S. 177, 184-185 (1938).

The Board centered its inquiry in the present case upon whether the alleged common carrier was engaged as a regular business in offering air transportation to the general public in the commercial market. The Board has taken the same approach in other cases.[7] This general emphasis is justified by the common law precedents, for the dominant factor in fixing common carrier status at common law is the presence of a "holding out" to transport the property or person of any member of the public who might choose to employ the proffered service. *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-212 (1927). The test which the Board applies is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it.[8] So long as the air carrier is competing commercially in the market for the patronage of the general public, the Board holds that it is immaterial

[7] *Consolidated Flower Shipments, Inc.*, 16 C.A.B. 804, 814-815 (1953), affirmed 213 F.2d 814 (9 Cir. 1954), and cases cited, particularly *Transocean Air Lines Inc.*, 11 C.A.B. 350 (1950).

[8] *Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, 72 F.Supp. 609, 611 (D. Alaska 1947). See also *United States v. California*, 297 U.S. 175, 181 (1936).

that the service offered will be attractive only to a limited group;[9] or that it may be performed pursuant to special contract.[10] And it is also immaterial that in terms of the carrier's own bookkeeping the transportation may be furnished at cost,[11] at a loss,[12] or even without charge.[13] The Board thus interprets the Act in a way which makes effective economic regulation under the statute possible by bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally.

In the present case the record shows that over a period of years the petitioners have conducted regularly scheduled passenger flights from the Los Angeles area to Las Vegas. The flights were conducted in planes owned by Hacienda, marked with its name, and operated by uniformed Hacienda employees. They departed from regular commercial airports. Passengers received the usual air terminal services: a check-in counter, boarding passes, flight calls, and the assistance of ground attendants. The flights were sometimes identified in

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[9] *Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, 72 F.Supp. 609, 610-611 (D. Alaska 1947); *Consolidated Flower Shipments, Inc.*, 16 C.A.B. 804, 815, 818 (1953), affirmed 213 F.2d 814 (9 Cir. 1954). See also *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916).

[10] *Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*, 80 F.Supp. 502, 601 (D. Alaska 1948); *Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, 72 F.Supp. 609, 611 (1947); *Transocean Air Lines Inc.*, 11 C.A.B. 350, 353 (1950); N.E.A. The Status of Non-Scheduled Operations under the Civil Aeronautics Act of 1938, 11 Law & Contemp. Prob. 508, 517-518 (1946).

[11] *Consolidated Flower Shipments, Inc.*, 16 C.A.B. 804, 805, 819 (1953), affirmed 213 F.2d 814 (9 Cir. 1954).

[12] *Hacienda Hotels, Motels, Rooms and Flight Reservations, Inc.*, 24 C.A.B. 372, 377 (1958).

[13] *Pacific Air Tours Flight Case*, 18 C.A.B. 214, 219 (1953).

Hacienda's advertising as "Fiesta Flights." The package tours of which the flights were a part were advertised and sold as "Champagne Tours." Patrons were solicited from the general public in the Los Angeles area through advertisements in radio, newspapers, and brochures. These used such leaders as "Fly Free to Vegas," described the aircraft used, and set out the flight schedules. "Champagne Tours" were sold both through Hacienda's own ticket offices and through travel and tour agents who also sold tickets on other regularly scheduled passenger airlines. The price of the "Champagne Tour" was $27.50. Round trip air transportation between Las Vegas and the Los Angeles area by certified carrier was $39.20 first class, $30.50 coach. As the Examiner found, not surprisingly, "the evidence here is substantial that some people purchase the tour merely to obtain transportation."[14]

Clearly the record contained substantial support for the Board's conclusion that Hacienda was a "common carrier for compensation or hire," as the Board correctly defined that statutory phrase.

II

Hacienda concedes that the record justifies the conclusion that it represented to the traveling public that transportation by air from the Los Angeles area to Las Vegas is available on a regularly scheduled basis by the purchase of Hacienda's "Champagne Tour." Nonethe-

[14]Quoting further from the Examiner's findings:

"Hacienda's board chairman conceded the possibility that many persons might purchase the tour merely to obtain low cost transportation. In addition, prospective patrons were informed by Hacienda's travel agents that non-guests were eligible to purchase the tour and one such agent reminded the patron that Hacienda's fare was less than that of the certified air carriers."

less. Hacienda insists that it is not subject to economic regulation under the Act for a variety of reasons, all of which rest essentially upon the facts that Hacienda was primarily engaged in the resort hotel business and not the transportation business, that the furnishing of the transportation was only incidental to the promotion and operation of its resort hotel, and that it was not interested in profiting and did not profit directly from the transportation.

Petitioners advertised the transportation portion of their package tour as "free," and furnished it only as a part of a "Champagne Tour" consisting of other goods and services, the separate prices of which added up to the total price for the Tour.[15] Hacienda's books attributed no income to the sale of the transportation as such and carried the expense of its transportation activities as part of the general operating expense of the hotel. No transportation tax was paid to the Bureau of Internal Revenue.

Hacienda argued to the Board that the transportation which it provided was entirely free and hence was not "for compensation or hire" as required to bring it within the economic coverage of the Act. However, Hacienda has disclaimed that contention in this court in apparent recognition of the obvious fact that payment for the "Tour" was payment for all that the customer received in return, including the air transportation. Indeed, in the present case the air transportation was intended to

[15] The other items in the "Champagne Tour" and the values assigned to them were: Transportation between the airport and the Hacienda Hotel ($1.50); use of the Hotel's golf course ($4.00); an opportunity to participate in the Hotel's hole-in-one contest ($2.00); a bottle of champagne ($12.50); a buffet dinner in the Hotel dining room ($2.50); and $5.00 for use in the Hotel's gambling casino; total $27.50, which, as noted earlier, was the total price of the "Champagne Tour," including air transportation.

be, and undoubtedly was, the principal inducement for the purchase of the package. The Act would be ineffective indeed if its economic regulations could be avoided simply by selling transportation only in combination with something else and calling it free. The Board was not compelled to adopt such a self-defeating construction of the statute. As we have seen, the Board's approach, and we think it was the proper one, was to look instead to the essence of petitioners' operation to determine whether it involved the area of competitive activity which the statute intended to subject to regulation—the furnishing of transportation by air to the general public on a commercial basis.[16]

The petitioners argue that if the requirement that the carriage be "for compensation or hire" is satisfied whenever the carrier realizes an ultimate economic advantage from furnishing the transportation, the limiting language is effectively read out of the statute since, as a practical matter, transportation will never be furnished wholly without hope of gain. But Hacienda did not furnish transportation for nothing more than the hope or expectation of some generalized business advantage; it imposed a direct charge upon its customers for the transportation in combination with other goods and services. Aside from the present case, we agree

[16] The futility of following the petitioners in a search through the decisions at common law or under state statutes for an absolute meaning for the phrase "compensation or hire" is suggested by the fact that of the four cases most nearly in point which are cited by the parties, two hold in one direction and two in precisely the opposite. Compare *Chala v. Gordon*, 26 P.U.R.3d 47 (Cal. P.U.C. 1958), and *Village of Brookfield v. Goleblatt Bros., Inc.*, 33 P.U.R.(N.S.) 82 (Ill.C.C. 1940), cited by respondent, with *Re Larchmont Apartments, Inc.*, 16 P.U.R.3d 345 (N.Y.P.S.C. 1956), and *Yellow Cab v. Skyways Service Co.*, 30 P.U.R.3d 154 (Colo. P.U.C. 1960), cited by petitioners.

that transportation will rarely be offered to the general public on a genuinely gratuitous basis, but we do not believe that this circumstance requires the Board to restrict the concept of "compensation or hire" in a way which would exclude from the economic coverage of the Act carriage offered to the public in the market on a competitive commercial basis.[17]

Petitioners assert that they are not subject to economic regulation under the Act because their "Champagne Tours" are offered "in the conduct or furtherance of a business or vocation." The quoted language appears in the definition of "air commerce"[18] (which is subject to safety regulation), but does not appear in the definition of "air transportation"[19] (which is subject to economic regulation). Petitioners conclude that Congress intended flights "in the conduct or furtherance of a business or vocation" to be excluded from economic regulation. We think this construction is un-

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[17] And, of course, the furnishing of private carriage on a gratuitous basis is not at all unusual. The carriage of officers, employees and selected customers in company-owned planes is an example. Even this is a matter of degree, and miscellaneous carriage of this type could move into the area of common carriage and become subject to the Act if sufficiently expanded and regularized. For a situation of the character referred to which the Board held to be outside the scope of the statute's economic regulations, see *Pan American Ferry Flight Case*, 18 C.A.B. 214, 219 (1953).

[18] 1949 U.S.C. § 1301 (20) reads:

"'Interstate air commerce' * * * mean[s] the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft, in the conduct or furtherance of a business or vocation, * * * in interstate commerce * * *."

[19] 1949 U.S.C. § 1301 (21) reads:

"'Interstate air transportation' * * * mean[s] the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft * * * in interstate commerce * * *."

warranted. The coverages of safety and economic regulation under the Act are different. Economic regulation is limited to common carriage and the carriage of mail, but safety regulation is extended as far as the commerce powers will permit.[20] There is nothing to indicate that Congress intended that the statutory definitions applicable to the coverage of one should limit the other, and it would subvert the economic purposes of the Act to hold that they do.[21]

Petitioners urged the Board to exclude them from the coverage of the economic regulations of the Act through application of the "primary business doctrine," which was developed by the Interstate Commerce Commission under the Motor Carrier Act[22] and which has been codified as a part of that Act.[23] The Board properly declined to do so. The Board found adequate grounds for distinguishing the present case

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[20]"In general, the safety provisions apply to any aircraft, airman, or flight of aircraft.". NEAL, The Status of Non-Scheduled Operations under the Civil Aeronautics Act of 1938, 11 Law & Contemp. Prob. 508, 509 (1946).

[21]Petitioners also point out that the phrase "operation of aircraft in furtherance of a business" appeared in an early draft of the definition of "air transportation" and was later omitted. RHYNE, Civil Aeronautics Act Annotated, pp. 42-43, 71-72 (1939). This indicates to us only that Congress decided that the economic coverage of the Act should be co-extensive with air common carriage—that it should include transportation conducted in furtherance of a business when it was common carriage, and should exclude it when it was not.

[22]The doctrine is fully reviewed in the Interstate Commerce Commission's opinion in *Woitishek Common Carrier Application*, 42 M.C.C. 193 (1938).

[23]49 U.S.C. § 303 (c), which provides in pertinent part "nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes *unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation)* of such person." (Emphasis supplied.)

from Motor Carrier Act cases involving the "primary business doctrine," even assuming the applicability of that doctrine to cases arising under the Federal Aviation Act.[24] Moreover, the two statutes are so dissimilar that the use of the doctrine in Federal Aviation Act cases could be of little help at best, and would involve constant risk of producing results inconsistent with the purposes and administrative scheme of that Act.[25]

The Motor Carrier Act specifically defines the terms "common carrier," "contract carrier," and "private carrier" for the purposes of that Act and provides separately for the economic regulation of each of the first two.[26] The "primary business doctrine" is used to distinguish "common" and "contract" carriers, as defined, from "private" carriers, also as defined. The Federal Aviation Act, on the other hand, contains no definition of the common carriage to which the economic regulations of that Act apply, and neither "contract" carriage nor "private" carriage is defined or even mentioned. It would be wholly unjustified simply to assume that the two latter concepts are to be applicable

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[24]The Board pointed out that these cases involved the transportation of property only, and not persons; that the transporters were the owners, lessees, or bailees of the goods transported (see 49 U.S.C. § 303 (17)); and, most important, that there had been no holding out of service to the public.

[25]Even if the relevant provisions of the Federal Aviation Act and the Motor Carrier Act were identical, it would be questionable wisdom for the Board to borrow a legal doctrine which the Interstate Commerce Commission and the courts have surrounded with the complexities which now encumber the "primary business doctrine." One commentator finds the decisions in the area "strange and baffling." PORTER, Federal Regulation of Private Carriers, 64 Harv.L.Rev. 890, 902 (1951). Not the least of the difficulties is that the doctrine requires an inquiry "into the corporate psyche" to determine whether the corporation did or did not intend to profit from the transportation, as such. Id., at 903.

[26]The definitions appear at 49 U.S.C. § 303 (14), (15), and (17). And see 49 U.S.C. §§ 306 and 309.

in Federal Aviation Act cases and that they are to have the precise meaning attached to them in the definitions of the Motor Carrier Act and in the case law under that statute—yet an uncritical borrowing of the "primary business doctrine" would assume just that.

The two statutes differ in another respect relevant to this problem. The statutory scheme of the Motor Carrier Act contemplates that all "common" and "contract" carriage by motor vehicle subject to that Act will be conducted under certificates of public convenience and necessity or permits issued by the Commission, except as the statute itself specifically exempts certain classes of these carriers.[27] Quite unlike the Motor Carrier Act, the Federal Aviation Act provides for broad economic regulation of common carriage without specific

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[27] 49 U.S.C. §§ 306 and 309. Because of the peculiar structure of the Motor Carrier Act, the application of the "primary business doctrine" to cases under the Federal Aviation Act would, in effect, borrow a general doctrine based upon the Motor Carrier Act and at the same time decline to borrow an exception to that doctrine founded in the express provisions of the Motor Carrier Act—thereby producing a result exactly opposite to that which would have been reached by the Interstate Commerce Commission under its own Act. Section 203(b)(3) of the Motor Carrier Act (49 Stat. 543, 49 U.S.C. § 303 (b)(3)) specifically exempts from that Act motor vehicles used to carry passengers between hotels and common carrier stations, and the Commission has held that this express exemption indicates a congressional intention that the carriage of passengers between hotels and points *other* than common carrier stations (as in the present case) is *within* the coverage of the Motor Carrier Act, the "primary business doctrine" to the contrary notwithstanding. *Shores and Brown*, 26 M.C.C. 243, 244 (1940). Thus, petitioners argue that the "primary business doctrine" requires their exemption from the Federal Aviation Act, although as a motor carrier conducting the same operation they would clearly not be exempt from the Motor Carrier Act. See also 49 U.S.C. § 303 (b)(9) which exempts casual carriage by a person not engaged in transportation unless, as in the present case, the transportation is offered for sale by brokers who also sell transportation service furnished by certificated carriers.

exemptions and vests in the Board itself the authority in appropriate circumstances to exempt carriers which would otherwise be subject to economic regulation.[28] Thus, the Federal Aviation Act establishes a flexible system enabling the Board to provide an initial period in which new types of air transportation can be developed free of onerous regulations, to be brought into the regulatory pattern of the Act when they mature and under conditions consistent with their particular needs.[29] This does not mean that the Board is left at large to extend or limit the coverage of the economic regulations of the Act as it may deem expedient,[30] but

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[28] 49 U.S.C. § 1386.

[29] *Large Irregular Air Carrier Investigation*, ... C.A.B. ..... (1959), CCH Aviation Law Reporter, C.A.B. Cases 1958-1960, ¶22,247 at 14,389-90:

> "The Board over the years, pursuant to its promotional responsibilities, has furthered the system's evolution and growth by the certification of new air carriers and by awarding new service authorizations to existing carriers. Thus, the Board has fostered the creation of local service carriers, all-cargo carriers, helicopter carriers, and has brought into the area of international, overseas, and territorial air transportation both newly created carriers and those who were previously confined to domestic operations only. The significant milestones in this evolution have been the introduction of new and often distinctive services or types of service to the public, regardless of whether they were provided by existing carriers or new entrants. In authorizing these services, the Board has frequently employed both its certification and its exemption powers, with exemptions sometimes constituting a precursor to certification in the development of a particular service or field of service until its proper place in the nation's air transportation system had been established."

See also *American Airlines, Inc. v. CAB*, 231 F. 2d 483 (D.C. Cir. 1956). Under present regulations exemptions are applicable to large irregular air carriers (14 C.F.R. § 291); Alaska air carriers (14 C.F.R. §292); military operations carriers (14 C.F.R. §249); indirect air carriers (14 C.F.R. § 296); international air freight forwarders (14 C.F.R. § 297); and air taxi operators (14 C.F.R. § 298).

[30] The Board may exempt a carrier from requirements of the Act "only if it first finds that enforcement of those requirements

it does suggest that the intentionally flexible operation of this statute ought not to be frustrated by the introduction of a doctrine based upon a different, and much more rigid, statutory scheme.[31]

III

The petitioners argued here and to the Board that the Hacienda flights are in the public interest in that the service is unique, operates at hours at which scheduled carriers do not fly, requires no government subsidy, and serves to introduce the public to the advantages of air travel. The Board properly held that these considerations are irrelevant to the only question in this enforcement proceeding—whether the operation involved is subject to the jurisdiction of the Board under Section 1371 of the Act.[32] On the other hand, these and similar factors would, of course, be relevant in a proceeding to determine whether a certificate or exemption order should issue. The Board's instructions from the Congress include an injunction to foster "competition to the extent necessary to assure the sound development of an air-transportation system * * *,"[33] and the Board

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would have certain specified results because of the existence of certain specified conditions" as recited in the Act. *Pan American World Airways v. CAB*, 261 F. 2d 754, 757 (D.C.Cir. 1958), cert. denied 359 U.S. 912 (1959).

[31]We have been warned of the impropriety of assuming that Congress intended that judicial precedents and rules of interpretation applicable to the regulation of other forms of transportation were to be applied to the regulation of transportation by air:

> "However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimension transit." *Chicago & Southern Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 108 (1948).

[32]*Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*, 80 F.Supp. 592, 609 (D. Alaska 1948).

[33]49 U.S.C. § 1302(d).

has shown itself to be receptive to initiative and experimentation in the area subject to its regulatory control.

IV

The petitioners' argument that the Board's order is unsupportably broad is disposed of for this Circuit by the decision in *Consolidated Flower Shipments, Inc. v. CAB*, 213 F. 2d 814, 818 (9 Cir. 1954),[34] in which a similar order was upheld as sufficiently particularized by reference to the Board's complaint, investigation, and opinion. A reading of the complaint and opinion of the Board in the present record will sufficiently apprise the petitioners of the conduct complained of, and now enjoined.[35]

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[34] See also *Bingler Vacation Tours, Inc. v. United States*, 132 F.Supp. 793, 798 (D. N.J. 1955), affirmed 350 U.S. 921; *Brady Transfer & Storage Co. v. United States*, 80 F.Supp. 110, 118 (S.D. Iowa 1948), affirmed 335 U.S. 875.

[35] Although we sustain the order of the Board in the circumstances of this case, the form employed is not a desirable one. It should not be too difficult for the Board to frame an order prohibiting the illegal conduct in terms of objective criteria narrower than the statute yet broader than the precise facts of the particular case. Contrary to the Board's argument, to advise a respondent what it may not do, in such terms, is scarcely the equivalent of telling it how it may violate the law. The Board, like other regulatory agencies, has wide latitude in framing the appropriate remedy in a given case. *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611, 613 (1946). It is not confined to prohibiting the precise conduct found to be unlawful, for that, of course, would make evasion so simple as to invite it, and would render the order futile. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 52-53 (1948). The Board may enjoin unlawful practices reasonably related to those in which the respondent has indulged. *F.T.C. v. Mandel Brothers*, 359 U.S. 385, 392-393 (1959); *F.T.C. v. National Lead Co.*, 352 U.S. 419, 429 (1957); *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U.S. 694, 705-706 (1951). Such related acts may be enjoined in generic terms, provided that the conduct prohibited is reasonably identified and the injunction is based upon properly supported findings of a proclivity to unlawful activity. *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441, 456 (1922) ("any other equivalent cooperative means of");

V

The petitioner Price earnestly argues that he acted only as a salaried employee of Hacienda, and that the Board's cease and desist order therefore should not have been directed against him as an individual. If the Board finds that "any person has failed to comply with any provision" of the Act, it "shall issue an appropriate order to compel such person to comply therewith."[38] The Board here found that Price "is engaged in interstate air transportation as a common carrier for compensation or hire * * * without authority from the Board in violation of Section 401(a) of the Act." We know of no authority holding that Price's status as a corporate employee insulated him from the requirements of the Act. *SEC v. Universal Service Assn.*, 106 F. 2d 232, 238 (7 Cir. 1939), certiorari denied 308 U.S. 622, expressly holds to the contrary under the Securities Act of 1933 with respect to an attorney and corporate officer. This court's holding in *Consolidated Flower Shipments, Inc. v. CAB*, 213 F. 2d 814 (9 Cir. 1954) does not aid petitioners. Indeed, an examination of the record in that case discloses that the order of the CAB which was affirmed by this court included an injunction against an individual officer of the corporate petitioner.

The question remains, however, whether the Board's finding that Price engaged in "air transportation" without a certificate of convenience and necessity from the

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N.L.R.B. v. Globe Wireless Ltd., 193 F.2d 748, 752 (9 Cir., 1951) ("in any manner"). Compare *Puerto Rico Drydock & Marine Terminals, Inc. v. N.L.R.B.*, 284 F.2d 212, 216 (D.C. Cir. 1960), cert. denied 364 U.S. 212 ("in any other manner"). See also *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 387-389 (1946) ("in any other manner").

[38] 49 U.S.C. § 1482 (c).

Board was supported by substantial evidence. The evidence was ample that Price supervised the physical operation of the aircraft involved in the "Champagne Tours" and, of course, those operations admittedly were not certificated. However, the illegality of the uncertificated flights arose from the holding out (primarily through advertising, ticket sales, and similar activities) that the flights were available to the general public for compensation or hire. There is an occasional suggestion in the record that Price may have participated in this phase of the "Champagne Tour" operation as well, and that the Board concluded, from circumstances outside the record, that Price was in fact the effective organizer of both the "Champagne Tours" and of other, earlier violations of Section 1371. But these are occasional suggestions only, never pursued or developed in the record, and the Board's order must stand or fall upon the record as actually made. We conclude that as to Price the record is insufficient. Of course the order will continue to bind Price as well as others who may be "agents, successors and assigns" of Hacienda.

The order of the Civil Aeronautics Board is modified by striking the words "and Henry F. Price, individually and as agent and or manager of the flight division of Las Vegas Hacienda, Inc.," and, as modified, is affirmed.

(Endorsed) Opinion Filed Jan. 6, 1962.

Frank H. Schmid, Clerk.

APPENDIX C.

Extracts From Legislative History—Definitional Language From House and Senate Bills Preceding the Civil Aeronautics Act of 1938.

COMMENT

The history of the various bills preceding the Civil Aeronautics Act of 1938 is traced by Rhyne, Civil Aeronautics Act Annotated, Appendix A (1939).

SENATE BILLS (CHRONOLOGICALLY)

1. *Senate 3187, 73rd Cong., 2nd Sess., 78 Cong. Rec. 5384.*

Section 3 (a) (Economics):

"'Air Commerce' means transportation wholly or in part by aircraft of persons, mail and property on scheduled operations for hire."

2. *Senate 1332, 74th Cong., 1st Sess., 79 Cong. Rec. 746.*

Section 3 (a) (Economics and Safety):

"The term 'air commerce' means transportation in whole or in part by aircraft, of persons or property for hire, navigation of aircraft in furtherance of a business or navigation of aircraft from one place to another for operation in the conduct of a business."

3. *Senate 3027, 74th Cong., 1st Sess., 79 Cong. Rec. 8925.*

Section 303 (c) (Economics):

"The term 'air carrier' means any person who or which, whether as a carrier by air, a contract carrier by air or otherwise, transports passengers

or property by air in interstate or foreign commerce for hire."

4. *Senate 3420 [Report No. 1329], 74th Cong., 1st Sess., 79 Cong. Rec. 13,197.*

Section 403 (d) (Economics):

"The term 'air carrier' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property in interstate or foreign commerce by aircraft in regularly scheduled service for compensation or hire."

5. *Senate 2, 75th Cong., 1st Sess., 81 Cong. Rec. 67.*

Section 303 (c) (Economics):

"The term 'air carrier' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property in interstate commerce by regularly scheduled service for compensation or hire."

6. *Senate 3659, 75th Cong., 3rd Sess., 83 Cong. Rec. 3229.*

Section 203 (j) (Safety):

"'Civil Aviation' means the operation (by a person other than an air carrier as hereinafter defined) or navigation by aircraft * * * whether such aircraft is operated or navigated in the carriage of persons or property for compensation or hire, or in the conduct, or the furtherance, of any other business or vocation, or otherwise."

Section 301 (a) (Economics):

"'Air carrier' means any citizen of the United States, who, or which, undertakes, whether directly

or indirectly, or by a lease or any other arrangement, to engage in transportation by aircraft (1) as a common carrier of passengers or property for compensation or hire, or (2) of mail."

7. *Senate 3659—Amendment in the Nature of a Substitute, 75th Cong., 3rd Sess., 83 Cong. Rec. 4345.*

Section 1 (23) (Safety):

"'Interstate air commerce' means the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or the furtherance of a business or vocation."

Section 1 (24) (Economics):

"'Interstate Air Transportation' means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft."

8. *Senate 3760, 75th Cong., 3rd Sess., 83 Cong. Rec. 4344.*

The definitions of "Interstate Air Commerce" (Safety) and "Interstate Air Transportation" (Economics) were identical to the quoted language of the Truman Amendment to Senate 3659; see paragraph 7, supra.

9. *Senate 3845, 75th Cong., 3rd Sess., 83 Cong. Rec. 5379.*

Section 1 (b) (Economics):

"'Air carrier' means any citizen of the United States who, or which, undertakes, whether directly or indirectly, or by a lease or any other arrange-

ment to engage as a common carrier in transportation by aircraft of passengers, property, or mail for compensation or hire."

Section 1 (c) (Safety):

"'Air commerce' means the operation of aircraft by a person other than an air carrier in the carriage of persons or property for compensation or hire, or in the carriage of mail, or in the conduct or furtherance of any other business or vocation * * *"

10. *Senate 3845—As Amended and Reported Out of Committee by Senator Copeland (Senate Report 1661, April 28, 1938), 75th Cong., 3rd Sess., 83 Cong. Rec. 5379.* (This is the final Senate version of the bill in so far as present purposes are concerned.)

Section 1 (q) (Safety):

"'Interstate Air Transportation' * * * mean[s] * * * the carriage by aircraft of persons or property, for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct of a business or vocation."

Section 1 (r) (Economics):

"'Interstate Air Transportation' * * * means[s] * * * the carriage by aircraft of persons or property as common carrier for compensation or hire or the carriage of mail by aircraft * * *"

HOUSE BILLS (CHRONOLOGICALLY)

1. *H. R. 8953, 73rd Cong., 2nd Sess., 78 Cong. Rec. 5948.*

Section 3 (a) (Economics):

"'Air commerce' means transportation wholly or in part by aircraft of persons, mail, and property on scheduled operations for hire."

2. *H. R. 5174, 74th Cong., 1st Sess., 79 Cong. Rec. 1350.*

Section 31 (2) (Economics and Safety):

"'Air commerce' means (a) the carriage by aircraft of persons or goods for hire or reward, and (b) the operation or navigation of aircraft in the conduct or the furtherance of a business or vocation."

3. *H. R. 4600, 75th Cong., 1st Sess., 81 Cong. Rec. 1128.*

Section 303 (c) (Economics):

"The term 'air carrier' means any person who or which undertakes whether directly or by a lease or any other arrangement, to transport passengers or property in interstate commerce by regularly scheduled service for compensation or hire."

4. *H. R. 5234, 75th Cong., 1st Sess., 81 Cong. Rec. 1769.*

Section 303 (a) (Economics):

"'Air carrier' means any citizen of the United States who or which undertakes, whether directly or by a lease or any other arrangement to transport by aircraft, (1) as a common carrier, passengers or property in interstate, overseas, or foreign commerce, or (2) mail."

5. *H. R. 7273 [H. R. Report No. 911], 75th Cong., 1st Sess., 81 Cong. Rec. 5095.*

Section 303 (a) (Economics):

"'Air carrier' means any person who or which undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in transportation by aircraft of United States registry (1) as a common carrier of passengers or property in interstate, overseas, or foreign commerce for compensation or hire, or (2) of mail."

6. *H. R. 9738 (H. R. Report No. 2254), 75th Cong., 3rd Sess., 83 Cong. Rec. 2897.*

Section 1 (23) (Safety):

"'Interstate air commerce' means the carriage by airyraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or the furtherance of a business or vocation * * *."

Section 1 (24) (Economics):

"'Interstate air transportation' means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft * * *."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 821

LAS VEGAS HACIENDA, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40–57) is reported at 298 F. 2d 430. The findings and order of the Civil Aeronautics Board (Pet. App. 4–39) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1962, and a petition for rehearing was denied on February 23, 1962. The petition for a writ of certiorari was filed on March 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the findings showed that petitioner was offering regularly scheduled interstate air transportation as part of a single-price package tour, the Civil Aeronautics Board correctly held that petitioner was engaged in "the carriage by aircraft of persons * * * for compensation or hire", within the meaning of Section 101(21) of the Federal Aviation Act.

2. Whether the court of appeals improperly deferred to the Board in affirming its determination that petitioner's package tour operations were within the statutory definition of "air transportation" contained in Section 101(21) of the Federal Aviation Act.

3. Whether the Board's cease and desist order which was couched in the language of the statutory prohibition and which incorporated by reference the Board's findings and conclusions was invalid as either so vague or broad that it failed to apprise petitioner of the conduct enjoined.

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix (*infra*, pp. 15–16).

STATEMENT

Petitioner was charged with engaging in interstate air transportation "as a common carrier [of persons] for compensation or hire" (Section 101(21), Federal Aviation Act) without appropriate certificate authority from the Board, in violation of Section 401(a) of the

Act (Pet. App. 6, 35). After a full administrative hearing, the Board found the following facts:[1]

Petitioner, a corporation, operates a resort hotel and gambling casino at Las Vegas, Nevada. Since early 1958 petitioner has conducted single-price package tours from Los Angeles to its establishment in Las Vegas (Pet. App. 9–10).[2] The tour includes regularly scheduled air carriage, which petitioner advertises as "free," and also various goods and services at petitioner's hotel.[3] The price of the tour from Los Angeles, which includes the round-trip air transportation, is $27.50 (Pet. App. 13). Round trip fares for certificated carriers are $39.20 first class, $30.50 coach (Pet. App. 25, 46). Petitioner's books attribute no income to the sale of the transportation as such and carry the expense of its transportation activities as part of the

[1] The findings and conclusions of the examiner were adopted by the Board (Pet. App. 36).

[2] Previous to 1958 such flights had been conducted by a separate corporation formed by petitioner for that purpose. This corporation had handled all phases of the tours except the physical operation of the aircraft which was provided by carriers under contract with it. The Board found that the separate corporation was operating as an indirect air carrier (49 U.S.C. 1301(3)), and ordered it to cease and desist. *Hacienda Hotels—U.S. Aircoach Enforcement*, 26 C.A.B. 372 (1958). Petitioner was not a party to that proceeding and within a month of issuance of the Board's order petitioner took over the operation (Pet. App. 10–11).

[3] These included use of the petitioner's golf course, participation in a "hole-in-one contest," and a buffet dinner at the hotel. Also included were a bottle of champagne and a $5.00 rebate in cash to be spent for food, drink or gambling (Pet. App. 12–13).

general operating expense of the hotel (Pet. App. 14, 47).

The aircraft on which the tour patrons are flown are owned by petitioner and operated by petitioner's uniformed employees. Flights depart from regular commercial airports and passengers receive the regular air-terminal services: a check-in counter, boarding passes, flight calls, the assistance of ground attendants and ground transportation between the airport at Las Vegas and petitioner's hotel (Pet. App. 12–13, 45). Patrons are solicited from the general public through advertisements on radio and in newspapers and brochures, and the tours are sold both through petitioner's own ticket offices and through travel and tour agents who also sell tickets for regularly scheduled passenger lines (Pet. App. 12, 46). Petitioner's travel agents have advised prospective patrons that they need not be guests at petitioner's hotel to be eligible to purchase the tour and one agent emphasized that petitioner's fare was less than that of the certificated air carriers (Pet. App. 21, 46).

In April 1959, petitioner increased the frequency of its service between Los Angeles and Las Vegas (Pet. App. 10). In July 1959, about a month after filing of the Board's complaint, petitioner extended its

service to Las Vegas from Santa Ana, California, making six round trips a week, and from Ontario, California, operating primarily on weekends. In October 1959, it initiated four-times-a-week flights between San Francisco and Las Vegas, using pressurized aircraft (Pet. App. 10–11).

The Board found that petitioner's "service has been and is being held out to the general public" (Pet. App. 20), that "air transportation is by far the most important item in the package" and is, in fact, "the principal inducement for purchase of the tour" (Pet. App. 25), that the "tour is one, entire, and indivisible" (*ibid.*) and that "the price which the patron pays for the package must be considered as including compensation for transportation" (Pet. App. 22). It held that petitioner could not "avoid regulation under Section 401 * * * [by] sever[ing] one of a number of items from the tour package and elect[ing] not to charge for it while charging for all the other items of the tour * * *" (Pet. App. 22). The Board accordingly concluded that petitioner was "a common carrier for compensation or hire" (Section 101(21), *infra*, p. 16). Since petitioner did not hold appropriate authority to engage in air transportation (Section 401(a), *infra*, p. 16), the Board entered a cease and desist order (Pet. App. 33–34).

The court of appeals affirmed in all respects material here (Pet. App. 40–57).[4] It said (*id.* 47–48):

> * * * in the present case the air transportation was intended to be, and undoubtedly was, the principal inducement for the purchase of the package. The Act would be ineffective indeed if its economic regulations could be avoided simply by selling transportation only in combination with something else and calling it free. The Board was not compelled to adopt such a self-defeating construction of the statute.

The court also rejected petitioner's claim that the Board's order was too broad and vague, holding that the order read in relation to the complaint and opinion of the Board "will sufficiently apprise the petitioners of the conduct complained of, and now enjoined" (Pet. App. 55).

ARGUMENT

The instant case was correctly decided below and presents no question warranting review.

1. Both from an operational and a competitive standpoint petitioner's transportation is virtually indistinguishable from that provided by any duly au-

[4] The Board's order was also directed to Henry F. Price, manager of the petitioner's "flight division" and president of petitioner's separate corporation involved in the prior enforcement proceeding (see *supra*, p. 3, n. 2). The court of appeals deleted Price from the order on the ground that there was insufficient evidence in the record that he participated in "holding out * * * that the flights were available to the general public for compensation or hire" (Pet. App. 57). The government has not sought review of this determination.

thorized air carrier. Yet petitioner claims that its operations are beyond the scope of the economic regulatory provisions of the Federal Aviation Act. Its contention is that it is not engaged "as a common carrier for compensation or hire" (Section 101(21) of the Act, *infra*, p. 16) because it does not charge for transportation which it furnishes in furtherance of its principal hotel and entertainment business (Pet. 2). But the Board found to the contrary (Pet. App. 22, 25) and, as the court of appeals noted in accepting that finding, petitioner "did not furnish transportation for nothing more than the hope or expectation of some generalized business advantage; it imposed a direct charge upon its customers for the transportation in combination with other goods and services" (Pet. App. 48).[5]

The situation here is not unlike that in *Herbert v. Shanley Co.*, 242 U.S. 591, 594–595, in which the Court, in rejecting a claim that musical compositions were not performed "publicly for profit" in the public dining room of a hotel, observed that the perform-

[5] Indeed, petitioner informs the Court that its operations are competitive with those of the certificated airlines, and that in excess of 7,000 persons each month are transported under such package tour plans (Pet. 8–9). The record shows that petitioner had been steadily expanding its operations (Pet. App. 10–11).

[6] Package tours or excursions by all forms of transportation are commonplace, and have generally been regarded as involving common carriage for compensation from a regulatory standpoint. One-price tours available only to the guests of a hotel likewise have long been so regarded. *E.g., Shores and Brown Common Carrier Application*, 26 M.C.C. 243; *Huff Common Carrier Application*, 16 M.C.C. 159, 27 M.C.C. 643.

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ances were "a part of a total for which the public pays and the fact that the price of the whole is attributed to a particular item which those present are expected to order [i.e., meals] is not important."

Apparently accepting the Board's finding that it made a charge for the transportation, petitioner argues variously that its air carriage services are still immune from economic regulation either because the charge is not separately stated or because it does not cover petitioner's costs or provide a profit (Pet. 7–20). In support of the latter contention, petitioner argues that "compensation," as used in the Federal Aviation Act, means a charge sufficient to cover the cost of transportation and "hire," one which provides a profit (Pet. 11–12).[1] There is, however, no warrant for such a restrictive interpretation which, as a practical matter, would exempt many substantial transportation enterprises from economic regulation. As the court of appeals found from a review of the legislative history and objectives of the Act, petitioner's construction of the statute is "self-defeating"[2]

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[1] See, also, *Ollendorff Watch Co.* v. *Pink*, 279 N.Y. 32, 17 N.E. 2d 676, 677, and *E. I. du Pont de Nemours & Co.* v. *Kaufman & Chernick Co.*, 337 Mass. 216, 148 N.E. 2d 634, 636, which recognize, as did the court below, that payment for an item which includes another alleged to be free constitutes payment for both.

[2] For this "technical meaning" (Pet. App. 10) which petitioner would ascribe to the Federal Aviation Act, petitioner cites no federal cases and relies on state decisions interpreting standards to be applied under differing local regulatory schemes. As the court below indicated (Pet. App. 48, n. 16), such cases are not decisive of the proper interpretation of "for compensation or hire" as used in the Federal Aviation Act.

and would render it "ineffective indeed" (Pet. App. 48). The evident congressional purpose was to provide for regulation of "the furnishing of transportation by air to the general public on a commercial basis" (*ibid.*). The Board's interpretation of "for compensation or hire," according to the Court, "makes effective economic regulation * * * possible by bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally" (Pet. App. 45). This holding is in accord with the views recently expressed by this Court with respect to the terms "for compensation" and "for hire" in *United States v. Drum*, 368 U.S. 370, 375, where the Court said: "Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal."[*]

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[*] There is no merit to petitioner's contention (Pet. 18–20) that it is not subject to economic regulation under the Act because its tours are operated "in the conduct or furtherance of a business or vocation." As the court of appeals noted, merely because this language appears in the definition of "air commerce" (§ 101(20)), which is subject to safety regulation, but does not appear in the definition of "air transportation" (§ 101 (21)), which is subject to economic regulation, it does not follow that Congress intended to exempt common carriage from economic regulation wherever it was shown that in some aspect it was carried on "in the * * * furtherance of a business or vocation" (Pet. App. 49). The two definitions serve entirely different ends. "There is nothing to indicate that Congress intended that the statutory definitions applicable to the coverage of one should limit the other, and it would subvert the economic purposes of the Act to hold that they do" (Pet. App. 50). The

2. There is nothing to the contention that the court of appeals improperly deferred to the Board's determination. The court expressly recognized that the "Board is [not] left at large to extend or limit the coverage of the economic regulations of the Act as it may deem expedient" (Pet. App. 53). The court accordingly made a careful review of the facts, the precedents and the Act's legislative history, and upheld the Board's determination upon finding (Pet. App. 46):

> * * * the record contained substantial support for the Board's conclusion that [petitioner] was a "common carrier for compensation or hire," as the Board correctly defined that statutory phrase.

The court's statement that it should go no further (Pet. App. 44) was but a recognition of the general rule laid down by this Court with respect to the appropriate scope of judicial review. *E.g., United States* v. *Drum*, *supra*, 368 U.S. at 376; *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 131.[10]

3. The Board's order requires petitioner to cease and desist from engaging in air transportation in vio-

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exclusion of the language from the definition of "air transportation" means no more than "that Congress decided that the economic coverage of the Act should be co-extensive with air common carriage—that it should include transportation conducted in furtherance of a business when it was common carriage, and should exclude it when it was not" (*ibid.*).

[10] *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, cited by petitioner (Pet. 21), is not to the contrary. The Court there simply found, in effect, that the administrative decision was at variance with the statute's "unequivocal" legislative history (321 U.S. at 150) and was unreasonable (321 U.S. at 151).

lation of Section 401(a), *i.e.*, without obtaining a certificate of public convenience and necessity.[11] Petitioner's contention that this is too "broad and uncertain" (Pet. 23) under this Court's decision in *Labor Board* v. *Express Publishing Co.*, 312 U.S. 426, rests upon the assumption that it enjoins all conceivable activities which might constitute "air transportation" within the meaning of the Act. The assumption is incorrect. The Board itself expressly stated in its opinion (which was incorporated as part of the order) that the order is not to be so construed, pointing out, in response to petitioner's objections to its breadth, that the activities "which are prohibited" are those set forth in the initial decision (which was adopted by the Board) and that "[a]ny possible doubt as to what constitutes the enjoined operations, or comprises any concomitant phase thereof, can be resolved by reference to that decision" (Pet. App. 36, n. 2).[12] While expressing its

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[11] The text of the Board's order which was identical to the examiner's proposed order (Pet. App. 33–34) provides:

> A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the entire record, having issued its opinion, containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;
>
> It is Ordered, That on and after 12:01 a.m., EDST, October 11, 1960, Las Vegas Hacienda, Inc., its agents, successors and assigns, and Henry F. Price, individually and as agent and/or manager of the flight division of Las Vegas Hacienda, Inc., cease and desist from engaging directly or indirectly in air transportation within the meaning of Sections 101(10) and 101(21) of the Federal Aviation Act of 1958, in violation of Section 401(a) of the Act.

[12] The Board's findings and conclusions were incorporated into the order by specific reference (Pet. App. 33–34).

view that greater precision was desirable in the drafting of orders, the court of appeals agreed that this construction of the order "will sufficiently apprise the petitioners of the conduct complained of, and now enjoined" (Pet. App. 55). In determining the scope of an order, this Court has read "the order in its relation to the circumstances of th[e] case * * *." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 423–425. Moreover, the Board's orders are not self-executing but rather must be enforced by a district court (Sections 902, 1007, 49 U.S.C. 1472, 1487) and a violation of the order must be shown.

Under varying guises petitioner's package tour flight operations have been twice found illegal by the Board over a short span of time. "It would not appear incumbent on the Board at this time to tell the petitioner how far it can go without breaking the law" a third time. *Consolidated Flower Shipments, Inc.—Bay Area* v. *Civil Aeronautics Board*, 213 F. 2d 814, 818 (C.A. 9). As in *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C.A. 7), petitioner can have "no doubt of the evils complained of and sought to be corrected."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1962.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*) are:

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the oper-

ation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

* * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

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IN THE

Supreme Court of the United States

No. 821

OCTOBER TERM, 1961.

LAS VEGAS HACIENDA, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Brief in Reply to the Brief for the Civil Aeronautics Board in Opposition.

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ARGUMENT.

Importance of Questions Presented.

The Board in its Brief in Opposition addresses itself solely to the question of probable error. At no point does it take issue with petitioners contentions with regard to the importance of the questions presented. For the reasons stated in its petition, petitioner respectfully submits that each question presented is clearly of importance and warrants consideration by this Court.

Probable Error.

1. The Board's argument that the "for compensation or hire" language of the Act should not be given its common and ordinary or technical meaning, that recourse should be had instead to judicial views as to the need for regulation under the broad, general policies of the Federal Aviation Act is unsound.

Neither party has found legislative history attempting definition of the "for compensation or hire" language. The Act itself is silent. But, that language has a well understood common and ordinary meaning which the carrier cases have adopted (See Pet. at pp. 11-12, and cases cited). In particular, the carrier cases have held that where as here a carrier charges the same price for its goods and services when transportation is provided as when it is not, then carriage is not "for compensation or hire." (Pet. at pp. 12-13). The issue has been raised and resolved in some fourteen jurisdictions and twenty-three cases; only two have held to the contrary. The rule is hence well established elsewhere and petitioner believes well grounded in sound reason: *Re Larchmont Apartments, Inc.*, 16 P. U. R. 3rd 45 (N.Y.P.S.C. 1956); *Collins-Dietz-Morris Co. v. State Corporation Commission*, 154 Okla. 121, 7 P. 2d 123 (1931).

Neither the Board in its Brief or the Court below has disputed the common and ordinary meaning of the language or its technical application in the law of carriers. What both contend is that to adopt such a definition would defeat the statutory purposes and render regulation by the Board ineffective; further that regulation of all those who compete in the commercial market is necessary to effectuate the statutory purposes. The

established meaning and effect of the statutory language is accordingly ignored entirely and the state cases in point summarily dismissed.

It is first submitted that this is flatly contrary to this Court's decisions in *N. L. R. B. v. Coca-Cola Bottling Co.*, 350 U. S. 264, 100 L. Ed. 285 (1956), and *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488 (1944). Secondly, there is no evidence of record whatsoever to support the factual assumption of economic impact on commercial carriers and the market upon which the Ninth Circuits policy views rest. The Circuit Courts opinion is no more than a judicial guess as to the effect of petitioner's operations, a complex fact question. And it is to be noted that in the absence of any evidence in point the Board in its opinion did not venture into this area.

It is submitted that it was for congress to decide how far to carry regulation so as to achieve the statutory objectives and that it did decide when it limited coverage of the Act to carriage "for compensation or hire." The congressional decision was not to "cover all commercial operations" (Rhyne, Civil Aeronautics Act Annotated at pp. 42-43 (1939); also authorities Pet. at p. 19). The Circuit Courts decision which blankets the field thus constitutes a "retrospective expansion of meaning which properly deserves the stigma of judicial legislation". (*Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 618).

It is submitted that the "for compensation or hire" language should, in the absence of attempt at definition in the statute or legislative history, be given its common and ordinary or technical meaning and that the court below erred by ignoring that meaning entirely and by

retrospectively expanding the scope of regulation by recourse to its own views as to the need for regulation.

2. It is variously suggested in both decisions below and in the Boards brief here, that petitioner's package tour is merely a guise, that petitioner cannot arbitrarily select out the flights for its own convenience and call them free while charging for the other package items, that failure to separately state a charge cannot be used as a devise to avoid regulation; in short, it is argued that petitioners torn package arrangement is a matter of pure form, not substance, adopted as a means of avoiding regulation.

This argument misses the entire thrust and import of the carrier price differential cases (Pet. at pp. 11-12), of the fact that petitioner charges no more when transportation is provided as when it is not. The other items making up the tour package are part of petitioners regular bill of fare. These items are sold at the same price at petitioner's hotel to all comers. The price attributed to each item in the tour package is the going price for each item. No more is exacted from tour patrons.

It would thus seem clear that the package arrangement is more than mere form or an arbitrary allocation selected by petitioner for its own convenience. Indeed, the Board found that the cost of the flights "in all probability equals or exceeds the aggregate costs of all other items." (Pet. App. at p. 22). Thus while selling the other package items at the same price they would otherwise be sold for, petitioner at least doubles its costs when the tour flights are included. There is a substantial economic bite. The arrangement is more than mere form. It should be obvious on such facts that Peti-

tioner neither recovers its costs or derives any profit from the flights as such, hence does not provide transportation "for compensation or hire."

It is submitted the economic or practical reality is that the flights are exactly what they purport to be, a promotional device to increase petitioner's hotel and entertainment business. Other hotels in Las Vegas resort to elaborate, expensive, and non-compensatory floor shows, paying well known entertainers huge salaries. Petitioner does not, but provides airplane trips instead. In each case the purpose and effect is the same, only the means differ.

As to the potential scope of operations like petitioners, it would appear that they would only be economically feasible in a similar resort type area, in which promotion plays a major role. The suggestion of widespread recourse to such operations throughout the country is no more than an attempt to march by an imaginary parade of horribles.

3. The cases cited by the Board in its brief to support the Ninth Circuit's result are readily distinguishable. *Herbert v. Shanley Co.*, 242 U. S. 591, 594-595, did not involve the "for compensation or hire" language which is language of art in the law of carriers. The particular policy of the copyright statute dictated the result, and the facts of the case are not even remotely similar to those here.

Shores and Brown Common Carrier Application, 26 M. C. C. 243, involved a one price package tour. But there the resort hotel made a designated additional charge of $13.00 for transportation over and above what it would otherwise have charged for the other tour items. And in *Huff Common Carrier Application*, 16 M. C. C.

159, 27 M. C. C. 643, an application for a "Certificate of Convenience and Necessity" was involved. No "for compensation or hire" issue was raised or decided.

Ollendorf Watch Co. v. Pink, 279 N. Y. 32, 17 N. E. 2d 676, 677, and *E. I. du Pont de Nemours & Co. v. Kaufman & Chernick Co.*, 337 Mass. 216, 148 N. E. 2d 634, 636, are both distinguishable as there the issue was whether there was "consideration", not whether there was "compensation or hire".

4. The reliance of the Board in its brief in *United States v. Drum*, 268 U. S. 370, with regard to the scope of review issue is missplaced.

There this court held that:

> "Because the Commissions resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedent so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission." (*Ibid.* 368 U. S. at 376).

Thus in the *Drum* case, the Commission's decision did not "violate the coherence of the body of administrative and judicial precedent so far developed". In the instant case, the Board's decision was directly contrary to the overwhelming weight of prior administrative and judicial precedent in the area.

5. Finally, with regard to the scope of order issue, the Board at page 12 of its Brief contends that the Board need not tell petitioner "how far it can go without breaking the law".

The Federal Aviation Act is a regulatory not criminal statute. If petitioner does not transcend the statu-

tory bounds, its conduct is perfectly lawful and legitimate. Where those bounds are to be fixed has been decidedly uncertain prior to this case, one of the first to consider the particular issues here involved. The suggestions of wrongdoing in the Board's brief is wholly without merit. Petitioner has assessed and determined the law as best it could determine it and continues to believe its position, supported by substantial authority, is correct.

Of course, it is not incumbent on the Board to tell petitioner how far it can go without breaking the law. Indeed, it would appear clear (see authorities Pet. at pp. 23-29) that the Board cannot do so. But petitioner believes the law to be that the Board must give petitioner fair notice of how far it can go without violating the Board's *Cease and Desist Order*. The Ninth Circuit in its opinion stated the Board should have been able to frame an adequate more specific order without undue difficulty. Petitioner submits that under any circumstances no less should be done.

Respectfully submitted,

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